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Got Mylk?

THE DISRUPTIVE POSSIBILITIES OF PLANT MILK

Iselin Gamber†

“The question of milk is important. It is important because milk has a transformative power that can shift the sacred to the profane, and vice versa.”—Yoriko Otomo¹

INTRODUCTION

In the 1970s, a small group of feminists dusted off an obscure Old English word and disrupted the patriarchy in the process. By replacing the offending “e” with an empowering “y” in the word “women,” the founders of the Michigan Womyn’s Music Festival took a stand against prevailing gender norms, sending the message that language is power, that words contain meaning both hidden and

† Professor of Legal Writing at The George Washington University Law School. I owe a deep debt of gratitude to Tobias Linné, Associate Professor at Lund University (Sweden) and co-founder and director of the Lund University Critical Animal Studies Network, without whom this article would not have been possible. Tobias was an invaluable collaborator on most of the core ideas in this article, the central thesis of which grew out of a series of conversations we had in the fall of 2016 and early 2017. Beyond working with me to develop the key ideas presented here, some of which we have written about together in op-eds and other articles, Tobias’ generosity in hosting me as a visiting researcher at the Lund University Critical Animal Studies Network during the 2017–18 academic year provided me with the time, space, and academic community that made this project possible. Thanks also to Andrea Freeman and Mathilde Cohen for their endless supply of support and inspiration through their own groundbreaking milk scholarship, and to Dinesh Wadiwel for the opportunity to present a draft of this article at a meeting of the Animal Rights Reading Group in Sydney, Australia, and to those who participated for their thoughtful engagement with the draft and their suggestions for improving it. Thank you to my colleagues Naomi Cahn, Joan Schaffner, Karen Thornton, and Christy DeSanctis for their support and encouragement, as well as Blake Morant and Roger Fairfax for the opportunity to take a research leave to develop the ideas in this article. Thank you to the editorial team at the *Brooklyn Law Review* for their patience and skillful editing. Thank you Ryan Fletcher, Christopher Schraeder, Hilary Whitaker, and Renee Reasoner for your unending support throughout the writing of this article. Finally, thank you to all of the scholars whose work has inspired and shaped the ideas developed in this article.

¹ Yoriko Otomo, *The Gentle Cannibal: The Rise and Fall of Lawful Milk*, 40 AUSTL. FEMINIST L. J. 215, 227 (2014), <http://dx.doi.org/10.1080/13200968.2014.1008097> [<https://perma.cc/X293-6QUE>].

intended, and that even a single letter can be significant.² “Womyn” remains in use to this day to signify an expression of female autonomy and a rejection of patriarchal linguistic norms.³

Plant milk⁴ advocates today are faced with a similar moment, one that will shape the future of the word “milk” and the cultural, political, and legal connotations that embody it. As consumers in the United States and Europe are increasingly concerned about the wide-scale suffering baked into the animal agriculture industry and the widespread negative impact that the industry has on the environment and climate change, plant milk sales have soared in recent years while demand for dairy milk has been falling for decades.⁵ Dairy milk producers and advocates appear threatened by plant milk’s steady rise in popularity. Despite the fact that plant milk has been called “milk” for thousands of years by cultures across the globe,⁶ dairy milk advocates have been waging a war against plant milk for the last several decades, fighting legal, legislative, regulatory, linguistic, and cultural battles over not only the very word “milk” but also over the cultural space it occupies.

In December 2016, the “milk wars” came to a boil in the United States when over two dozen congressmen sent a letter to

² See Christine Mallinson, *Language and Its Everyday Revolutionary Potential*, THE OXFORD HANDBOOK OF U.S. WOMEN’S SOCIAL MOVEMENT ACTIVISM 430–31 (Holly J. McCammon et al., eds., Oxford Univ. Press 2017) (“By re-spelling words such as *history* without using the letters ‘his’ and *women* without ‘men,’ the terms *herstory* and *womyn* draw readers’ attention to the missing ‘male’ segments of the words and their ‘female’ replacements, symbolically highlighting the need to counteract male historical dominance and male-centered historiography by actively making women visible in everyday language and everyday spaces”).

³ See *id.* at 430–31.

⁴ This article will use the term “plant milk” and related terms (i.e., “soymilk” or “almond milk”) to refer to substances that, in the EU, would legally be required to be called “___ drink” or “___ beverage.”

⁵ Oliver Franklin-Wallis, *White Gold: The Unstoppable Rise of Alternative Milks*, GUARDIAN (Jan. 29, 2019, 1:00 AM EST), <https://www.theguardian.com/news/2019/jan/29/white-gold-the-unstoppable-rise-of-alternative-milks-oat-soy-rice-coconut-plant> [<https://perma.cc/762F-5LJH>] (discussing the rise in popularity of plant milks in Europe and the United States). Globally, the plant milk industry is currently worth about sixteen billion dollars. *Id.* In the United Kingdom, plant milk sales have increased thirty percent since 2015, and in the United States, nearly half of all consumers buy plant milk. *Id.* While the dairy industry is worth more than four hundred billion dollars globally, consumers are drinking less and less dairy milk each year, with sales falling fifteen percent since 2012 in the United States. *Id.* The environmental impacts of the animal agriculture industry are staggering: it “contributes more greenhouse gases than aviation, shipping and road vehicles combined.” *Id.* A recent Oxford University-led study concluded that “observing a vegetarian or vegan diet is the single most effective way to reduce your own environmental footprint.” *Id.*

⁶ See, e.g., Benjamin Kemper, *Nut Milks Are Milk, Says Almost Every Culture Across the Globe*, SMITHSONIAN MAG. (Aug. 15, 2018), <https://www.smithsonianmag.com/history/nut-milks-are-milk-says-almost-every-culture-across-globe-180970008/> [<https://perma.cc/BTN7-5LYB>].

the United States Food and Drug Administration (FDA) urging it to enforce its own regulations and prohibit plant milk companies from using the word “milk” on their labels because it is “misleading to consumers, harmful to the dairy industry, and a violation of milk’s standard of identity.”⁷ In January 2017, Wisconsin Senator Tammy Baldwin introduced the Dairy Pride Act, which would update the U.S. Code’s section on “misbranded food” to prohibit plant-based products from using terms such as “milk,” “yogurt” or “cheese” on their labels.⁸ The following month a group of white men gathered in New York City for what has since been dubbed “the milk party,” chanting explicitly racist and sexist rants while holding up and taking swigs from gallon-sized jugs of the seemingly wholesome substance, continuing a long history of connecting racist and sexist rhetoric to milk.⁹ In July 2018, FDA Commissioner Scott Gottlieb remarked that “[a]n almond doesn’t lactate,” indicating that a change in the longtime FDA practice of ignoring its own regulatory language on the subject of the word “milk” may be on the horizon.¹⁰ These incidents followed a series of legal and cultural battles over milk in Europe, where the European Court of Justice ruled in 2017 that plant-based products are prohibited from using the word “milk” in their labels or marketing,¹¹ and the Swedish Market

⁷ The letter was co-authored by Democrat Peter Welch of Vermont and Republican Mike Simpson of Idaho. Letter from Rep. Peter Welch, Mike Simpson & Members of Congress to Hon. Robert M. Califf, Comm’r, Food & Drug Admin. (Dec. 16, 2016) [hereinafter “Welch-Simpson Letter”], <http://www.nmpf.org/files/Welch-Simpson%20Letter.pdf> [https://perma.cc/Z26J-3GHV]; see also Press Release, U.S. Congress, Welch Leads Bipartisan Effort to Stop the Illegal Branding of ‘Fake Milk’ as Real Milk (Dec. 16, 2016) [hereinafter “Welch Press Release”], <https://welch.house.gov/media-center/press-releases/welch-leads-bipartisan-effort-stop-illegal-branding-fake-milk-real-milk> [https://perma.cc/5ENF-EACF]; 21 C.F.R. § 131.110 (2018).

⁸ See *Overview of DAIRY PRIDE Act*, NAT’L MILK PROD. FED’N [http://www.nmpf.org/files/DAIRY PRIDE Act - One Pager.pdf](http://www.nmpf.org/files/DAIRY%20PRIDE%20Act%20One%20Pager.pdf) [https://perma.cc/2PM8-C89V].

⁹ Mario, *HWNDU Season 2 Finale: /pol/ Milk Party then Shut it Down—Full 50 Minutes*, YOUTUBE (Feb. 5, 2017), <https://www.youtube.com/watch?v=4nuSuVf5km4> [https://perma.cc/36U2-PAZJ] [hereinafter *Milk Party*]; see also Iselin Gambert & Tobias Linné, *From Rice Eaters to Soy Boys: Race, Gender, and Tropes of Plant Food Masculinity*, 7 ANIMAL STUD. J. 129, 142–43 (2018) [hereinafter Gambert & Linné, *Rice Eaters to Soy Boys*]; Iselin Gambert & Tobias Linné, *How the Alt-Right Uses Milk to Promote White Supremacy*, CONVERSATION (Apr. 26, 2018, 4:59 AM EDT), <https://theconversation.com/how-the-alt-right-uses-milk-to-promote-white-supremacy-94854> [https://perma.cc/N83T-9ZBT].

¹⁰ Alexander Nieves, *Gottlieb: FDA to Crack Down on Labeling Nondairy Products as ‘Milk,’* POLITICO (July 17, 2018, 11:25 AM EDT), <https://www.politico.com/story/2018/07/17/almond-lactate-nondairy-milk-scott-gottlieb-725974> [https://perma.cc/NP52-WXZE].

¹¹ Case C- 422/16, *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH*, (June 14, 2017), <http://curia.europa.eu/juris/document/document.jsf?docid=191704&doclang=EN> [https://perma.cc/CB7F-9RK8].

Court banned the local oat milk company Oatly from using the phrase “[i]t’s like milk, but made for humans” on its packaging.¹²

The goal of this article is to explore the legal, political, cultural, and linguistic forces behind the “milk wars” in both Europe and the United States and suggest that a single letter may offer a path forward. This article argues that while plant milk should not be *legally* prohibited from being called “milk,” it may not be a word worth fighting for; instead, plant milk producers and advocates should consider replacing the word “milk” with “mylk” in order to signal an intentional departure from the many forms of exploitation and oppression that have long been bound up in the word “milk” with an “i.”

This article proceeds in three Parts. Part I unpacks the various meanings of the word “milk” from both legal and cultural perspectives and examines a number of “milk wars” between plant milk and dairy milk advocates and industries in both the United States and Europe, as well as the governmental forces that exist to protect the dairy industry. Ultimately, this Part argues that plant milk should win the legal aspects of the U.S. milk wars and is already winning the cultural milk wars on both sides of the Atlantic. Part II suggests that given the entanglements of milk with the oppression and exploitation of women, people of color, and non-human animals, the word “milk” with an “i” may not be worth plant milk advocates fighting for. Part III explores plant milk’s potential as a “disruptive milk,” one that can break free from the exploitation and oppression long bound up in dairy milk. It explores the concept of “verbal activism” in other contexts and argues that an act of verbal activism—replacing the word “milk” with “mylk” with a “y”—may present plant milk producers and advocates with an opportunity to showcase to consumers a more intentional and empowered choice. Finally, it explores the limitations of “mylk” and plant milk activism in uncoupling milk from exploitation and oppression, arguing that as long as plant milk exists within the current capitalist framework it will be inextricably bound up with exploitation and oppression to some degree. Ultimately, however, this is not a reason for plant milk advocates to stop advocating for a more sustainable, less exploitative world.

¹² See Marknadsdomstolen [MD] [Market Court] 2015 case no. C 23/14 (Swed.), http://avgoranden.domstol.se/Files/MD_Public/Avgoranden/Domar/Dom2015-18.pdf [<https://perma.cc/78C4-PLFJ>]. An example of the package at issue in the case is available at http://avgoranden.domstol.se/Files/MD_Public/Avgoranden/Bilaga/Bilaga2015-18.pdf [<https://perma.cc/CG75-3JM6>] [hereinafter Oatly Swedish Market Court Verdict].

I. THE BATTLE FOR “MILK” WITH AN “T”: A WORD WITH A PATCHWORK OF CONFLICTING LEGAL AND CULTURAL DEFINITIONS MAKES IT HARD TO DECLARE A WINNER IN THE “MILK WARS”

Milk is one of the most ubiquitous substances on the planet. It is a substance so bound up with human civilization that our own galaxy, the Milky Way, was even named after it.¹³ Milk—both human and animal—is one of the most regulated substances on the planet and has been since at least the nineteenth century, though laws and regulations surrounding milk go back thousands of years.¹⁴

But as central as milk is to humankind, it is far from clear what “milk” actually is—and what it is not. Dictionary, legal, and cultural definitions are often at odds with each other, resulting in legal and cultural battles around the globe that have been dubbed the “milk wars.”¹⁵

A. *The Dominant Dictionary and Legal Definitions Crafting Milk with an “T” Are at Odds with Prevailing Cultural Uses of the Word*

A glance at the word “milk” in the Oxford English Dictionary (OED) reveals that the word’s primary meaning is understood to be inherently both female and animal in nature: “MILK (noun): a whitish fluid, rich in fat and protein, secreted by the mammary glands of female mammals (including humans) for the nourishment of their young, and taken from cows, sheep, etc., as an article of the human diet.”¹⁶ The implications of this definition on what can be understood as “milk” will be explored further below, but as a starting point it must be noted that this

¹³ Elizabeth Howell, *Why Is Our Galaxy Called the Milky Way?*, UNIVERSE TODAY (Jan. 22, 2015), <https://www.universetoday.com/84662/why-is-our-galaxy-called-the-milky-way/> [https://perma.cc/5Z97-AFDE].

¹⁴ Otomo, *supra* note 1, at 216; see also Mathilde Cohen, *Of Milk and the Constitution*, 40 HARV. J. L. & GENDER 115, 118, 125 (2017) (which “argues that milk’s ubiquitous judicial presence has led not only to its construction as a cultural icon, but also to its status as a ‘quasiconstitutional’ right”).

¹⁵ The “war” metaphor was used in Swedish media in 2014 and 2015, and in U.S. media in 2017. See, e.g., Richard Löf, *Mjölkkrig i mejeridisken* (“Milk Wars in the Dairy Aisle”), SVT NYHETER (Nov. 19, 2015), <http://www.svt.se/nyheter/lokalt/skane/krig-i-mjolkdisken> [https://perma.cc/ET6F-ZMTA]; Martina Pierrou, *Mjölkkrig mellan Oatly och LRF* (“Milk War Between Oatly and LRF”), SVERIGES RADIO (Oct. 28, 2014), <http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=6003479> [https://perma.cc/QN4X-39Z6]; Chase Purdy, *There’s a War over the Definition of “Milk” Between Dairy Farmers and Food Startups—and Trump May Settle it*, QUARTZ (Mar. 3, 2017), <https://qz.com/923234/theres-a-war-over-the-definition-of-milk-between-dairy-farmers-and-food-startups-and-donald-trump-may-settle-it/> [https://perma.cc/U9EB-S9XS].

¹⁶ *Milk*, OXFORD ENGLISH DICTIONARY (2018).

definition explicitly excludes other substances that may be commonly thought of as milk, such as milk from plants.¹⁷

In the United States, government regulations have taken a very narrow view of “milk,” one that specifies not only the female and animal nature of milk but also the species that produces it. Growing out of federal “standards of identity,” which date back at least sixty years,¹⁸ the Code of Federal Regulations (C.F.R.) defines “milk” as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.”¹⁹ This definition, which is the one used by the FDA, notably excludes not only plant-based milk but also milk from humans,²⁰ sheep, goats, and indeed even *unhealthy* cows.

Similarly, the European Union (EU) has regulations dating back to 1987 that also narrowly define “milk” as animal in nature, save for a few carefully delineated exceptions such as coconut milk.²¹ As a result, soy, almond, rice, oat, and other plant-based milks and dairy substitutes are prohibited from using “milk,” “yogurt,” and related terms under EU regulations.²² These products must use terms like “soy beverage” or “oat drink” on their packaging.²³

Despite prevailing contemporary dictionary and legal definitions in the United States and European Union, the word “milk” has long been associated with plant milk both culturally and in the vernacular, with some research indicating that the first explicit references to the term “plant milk” date back to the fourth

¹⁷ See, e.g., Kemper, *supra* note 6.

¹⁸ See Suzanne White Junod, *Food Standards and the Peanut Butter & Jelly Sandwich*, in FOOD, SCIENCE, POLICY, AND REGULATION IN THE TWENTIETH CENTURY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 167–88 (David F. Smith & Jim Phillips eds., Routledge 2000) (noting that by 1957, standards of identity had been set for a variety of food items, including milk, cream, cheese, and butter). In its opposition to Good Food Institute’s Citizen Petition to the FDA, the National Milk Producers Federation (NMPF) claims that the standard of identity for milk is at least eighty years old, but provides no citation to support this contention; Nat’l Milk Producers Fed’n, Comment Letter in Opposition to Good Food Inst. Citizen Petition For Further Regulation 3 (Aug. 29, 2017), <http://www.nmpf.org/files/files/NMPF%20Comments%20on%20GFI%20Petition%2008%2029%202017%20FINAL.pdf> [<https://perma.cc/7V8U-65RL>] [hereinafter “NMPF Opposition”].

¹⁹ 21 C.F.R. § 131.110 (2018), <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=131.110> [<https://perma.cc/CEL5-ABGM>].

²⁰ In the U.K., ice cream made with human breast milk that had been donated by nursing women was sold in 2015 under the name Royal Baby Gaga. See Anucyia Victor, *Would YOU Eat Ice-Cream Made from Breast Milk? Campaigner Joins Forces with Dessert Makers to Create Controversial Treat Just in Time for the Royal Birth*, DAILY MAIL (Apr. 27, 2015, 12:54 PM EST), <http://www.dailymail.co.uk/femail/food/article-3057274/Breast-milk-ice-cream-released-time-royal-birth.html> [<https://perma.cc/2Z36-88WX>].

²¹ See *infra* notes 179–182. For a more detailed discussion of the EU regulations, see *infra* section I.B.2.

²² See *infra* notes 179–182. For a more detailed discussion of the EU regulations, see *infra* section I.B.2.

²³ See *infra* notes 179–182. For a more detailed discussion of the EU regulations, see *infra* section I.B.2.

century A.D.²⁴ A 1226 cookbook, from what is now present-day Iraq, referred explicitly to almond milk²⁵ and the first English mention of “almond milk” dates back to 1390.²⁶ Medieval European cooking manuscripts refer explicitly to the term “plant milk” and other related terms,²⁷ such as *lait d’almendes* (or in modern French, *lait d’amande*—milk of almond), seen repeated in a fourteenth century recipe book.²⁸

Soymilk originated in China during the Han Dynasty²⁹ and is referred to in Mandarin as either “豆奶 (. . . dòu nǎi, literally ‘bean milk’)” or “豆浆 (dòu jiāng, loosely translated as ‘bean slurry’).”³⁰ In Taiwan the variation “bean milk” is commonly used, and in Japanese the word 豆乳 (*tonyu*) means the same thing.³¹ Meanwhile, the word 두유 (*duyu*) in Korean shares “a similar linguistic origin.”³²

Dictionaries, including the OED, recognize that “milk” is a substance that can come from plants, though often not in the first or primary definition of the word.³³ The German word *sojamilch* (“soymilk”) and the French and Spanish phrases *lait de soja* and *leche de soja*—both of which literally mean “milk of soy”—are some examples from European languages that illustrate the way the word “milk” has become inextricably linked to the idea of plant milk around the world.³⁴

²⁴ *Plant Milks: Another Nutritional Trend?*, PLANT MILK (Mar. 4, 2015), <http://www.plantmilk.org/2015/03/04/plant-milks-another-nutritional-trend/> [<https://perma.cc/M32T-5S3G>]; see also Tobias Linné & Ally McCrow-Young, *Plant Milk: From Obscurity to Visions of a Post-Dairy Society*, in MAKING MILK: THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD 195–212 (Mathilde Cohen & Yoriko Otomo eds.) (describing a history of plant milk); Kemper, *supra* note 6.

²⁵ WILLIAM SHURTLEFF & AKIKO AOYAGI, HISTORY OF SOYMILK AND OTHER NON-DAIRY MILKS (1226 TO 2013): EXTENSIVELY ANNOTATED BIBLIOGRAPHY AND SOURCEBOOK 5 (Soyinfo Ctr. 2013), <http://www.soyinfocenter.com/pdf/166/Milk.pdf> [<https://perma.cc/39EK-LFH5>].

²⁶ *Id.*; see also Linné & McCrow-Young, *supra* note 24 (citing Shurtleff and Aoyagi 2013).

²⁷ *Plant Milks: Another Nutritional Trend?*, *supra* note 24.

²⁸ FDA-2017-P-1298, Citizen Petition from Good Food Inst. to Recognize the Use of Well-Established Common and Usual Compound Nomenclatures for Food 12 n.29, (Mar. 2, 2017) [hereinafter “GFI Citizen Petition”] (citing 23 LE VIANDIER DE TAILLEVENT (1892) transcription of the oldest surviving manuscript, circa 1323–1395), <http://www.gfi.org/images/uploads/2017/03/GFIpetitionFinal.pdf> [<https://perma.cc/P9XG-Y4H4>].

²⁹ See Linné & McCrow-Young, *supra* note 24.

³⁰ See GFI Citizen Petition, *supra* note 28, at 11 n.28.

³¹ *Id.*

³² *Id.*

³³ The second definition (or seventh, if you count definitions 1(a) though (f) as distinct definitions) for “milk” in the Oxford English Dictionary is “A milky juice or latex present in the stems or other parts of various plants, which exudes when the plant is cut, and is often acrid, irritant, or toxic. Also: *spec.* the drinkable watery liquid found in the hollow space inside the fruit of the coconut.” *Milk*, OXFORD ENGLISH DICTIONARY (2018).

³⁴ See GFI Citizen Petition, *supra* note 28, at 11 n.28.

The reality is that despite legal restrictions and prevailing dictionary definitions, the word “milk” today is *culturally* very much associated with plant-based drinks in the vernacular in the United States, the European Union, and elsewhere.³⁵ After living in Sweden and traveling extensively throughout the European Union while writing this article, the author discovered that, despite the *legal* prohibition of the word “milk” in reference to plant milk, the word is commonly used in the vernacular, both in casual conversation and written on the menus of virtually every café and coffee shop that offers a plant-based alternative to dairy milk.³⁶ In other words, making a word illegal to use in a particular context will not necessarily prevent people from using it in that context in their everyday lives.

In short, what emerges upon examining the word “milk” is the reality that there is a tension between the prevailing dictionary, legal, and cultural definitions of the word. While the law views the word as inherently female and animal in nature, and dominant dictionary definitions of the word agree, “milk” is not and perhaps never has been so limited in its usage by people who actually consume the substance around the world.

B. Conflicting Definitions and Conceptions of Milk Lead to “Milk Wars” on Both Sides of the Atlantic

There is much more at stake in resolving the conflicting understandings of the word “milk” than mere semantics. In fact, the conflict has given rise to long-standing “milk wars” on both sides of the Atlantic, with no clear end in sight.³⁷

1. U.S. Milk Wars: Long-Simmering Wars Are Being Brought to a Boil

Despite the current FDA regulations narrowly defining “milk” as “the lacteal secretion . . . obtained by the complete milking of one or more healthy cows,”³⁸ there are at least twenty-three plant-based milk products being sold in the United States at the time of this writing, some of them under names like “almond beverage” or “oat drink” but many—perhaps most—using names

³⁵ See, e.g., Kemper, *supra* note 6.

³⁶ The author has traveled extensively in Sweden, Denmark, Germany, and the U.K., and has seen and heard the word “milk” in reference to plant milk (i.e., “oat milk” or “almond milk” or “soy milk”) in all of these countries, both in spoken conversation in English, Swedish, and Danish, and on menus in cafés and coffee shops in the countries’ local languages.

³⁷ See references to the term “milk wars” in Europe and the United States, *supra* note 15.

³⁸ 21 C.F.R. § 131.110 (2018).

like “soymilk” or “rice milk.”³⁹ Decades of efforts for clarity from both dairy and plant milk advocates have been escalating in recent years and reached a boiling point in late 2016.

a. The U.S. Federal Government’s Inconsistency in Associating the Word “Milk” with Plant Milk Frustrates Advocates on Both Sides of the War

The U.S. federal government has long been inconsistent in its approach to the question of whether the word “milk” can be attached to plant-based products.⁴⁰ That inconsistency dates back to at least the year 1897, which is the first year the United States Department of Agriculture (USDA) explicitly used the word “milk” to refer to plant-based milk in a published table comparing “the composition of soy-bean milk and cows’ milk.”⁴¹ Both the FDA and USDA have used terms such as “soy milk,” “soy yogurt,” “soy cheese,” “almond milk,” and “rice milk” in official documents throughout the 1990s and 2000s, and as recently as December 2016.⁴²

Efforts to resolve the inconsistency have been ongoing for decades, with advocates of both plant-based milk and dairy milk attempting, thus far in vain, to gain clarity on the issue. In 1997 the Soyfoods Association of America (Soyfoods) submitted a Citizen Petition to the FDA requesting that it “recognize the term ‘soymilk’ as the established common or usual name to be used in labels and other labeling to identify a beverage of this nature.”⁴³ Arguing that “the word ‘soymilk,’ written as one word, has come to be widely used, recognized, and accepted to describe this particular type of food,” Soyfoods reasoned “that this term now should be officially recognized by [the] FDA as the correct

³⁹ National Milk Producers Federation (NMPF) identified those twenty-three plant-based milks as: “Algae, Almond, Banana, Barley, Cashew, Flax, Green Pea, Hazelnut, Hemp, Macadamia, Oat, Peanut, Pecan, Pistachio, Potato, Quinoa, Rice, Sesame, Soy, Sunflower, Tiger Nut, Walnut and Wheat.” NMPF Opposition, *supra* note 18, at 8 n.10. It is unclear why the NMPF Opposition omitted coconut milk, commonly seen in grocery store shelves in the United States and European Union. Lupin milk is also increasingly available in grocery stores and health food shops in the EU.

⁴⁰ GFI Citizen Petition, *supra* note 28, at 11.

⁴¹ SHURTLEFF & AOYAGI, *supra* note 25, at 6. The term was used again in USDA documents in 1916 and 1917. *Id.*

⁴² GFI Citizen Petition, *supra* note 28, at 11 (citing FDA, *Health Claims; Soy Protein and Coronary Heart Disease* 63 Fed. Reg. 62977, 62978 (Nov. 10, 1998); USDA, *Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)*, 81 Fed. Reg. 90675, 90693–94 (Dec. 15, 2016)); USDA & DEP’T. OF HEALTH & HUMAN SERV., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 23 (8th ed. 2015).

⁴³ FDA-97-P-0078, Citizen Petition from Soyfoods Ass’n of Am. to U.S. Food & Drug Admin. 1 (Feb. 28, 1997), <http://www.soyfoods.org/wp-content/uploads/SANA-Citizen-Petition-No.-97P-0078-2-28-97.pdf> [<https://perma.cc/H28V-SHBL>].

name for the product.”⁴⁴ To support its contention that the term “soymilk” has become a common or usual name worthy of FDA recognition, Soyfoods pointed to extensive research it did to document the “nomenclature practice” of soymilk products that led to Soyfoods developing a series of voluntary industry standards called “Voluntary Standards for the Composition and Labeling of Soymilk in the United States.”⁴⁵ Soyfoods argued that the “Soymilk Standards are themselves a notable new event that provides additional proof that the term ‘soymilk’ has in fact become established as the term used by both consumers and industry to identify this type of product.”⁴⁶ While they may be notable, it’s unclear whether the FDA and Congress will agree.

In February 2000, three years after Soyfoods submitted its Citizen Petition to the FDA, the National Milk Producers Federation (NMPF) wrote a letter to the FDA “requesting that [the agency] take appropriate enforcement action to prevent misbranded products from entering the marketplace and to promote honesty and fair dealing in the interest of consumers.”⁴⁷ The specific target of its letter was the “various soy-based beverages which are inappropriately using the name of a standardized food (i.e., ‘milk’) on the label for their products.”⁴⁸

NMPF struggled in its letter to make a logically coherent argument, largely because it argued for strict adherence to regulatory language in some instances and not in others. It began by arguing that “any product which uses the term ‘milk’ as part of the name of the food on the label . . . must comply with” the definition of milk as set out in 21 C.F.R. § 131.110.⁴⁹ At the same time, it acknowledged and dismissed the significance of the fact that the current standard of identity for “milk” is frequently violated when it comes to using the term to refer to products “from non-bovine species” such as sheep and goats.⁵⁰ Without citing any proof, NMPF argued “that this allowance for milk from non-bovine animals was never intended to include soy mixtures, [but] it is merely recognition that other species of animals provide milk through lactation.”⁵¹

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.* at 5–6.

⁴⁷ Gerry Clark, *Milk Producers Sack Soy Beverages*, DAIRY NETWORK (Feb. 14, 2000), <https://www.dairynetwork.com/doc/milk-producers-sack-soy-beverages-0001> [<https://perma.cc/58Q2-QMLR>] (reproducing a Letter from Robert D. Byrne, Vice President of Regulatory Affairs, Nat’l Milk Prod. Fed’n, to Joseph A. Levitt, Director, U.S. Food & Drug Admin. Ctr. for Food Safety & Applied Nutrition (Feb. 14, 2000)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

NMPF was also careful to craft a narrow argument focused solely on “soy-based beverages,” explaining “that some products, such as coconut milk, have a well-established historical use of the term ‘milk’ in their nomenclature” and asserting that these products “do not attempt to directly compete with traditional fluid beverage milk (from milking animals) in the market place” the way that soy-based beverages do.⁵² In short, NMPF argued that it was only soy-based beverages that were “attempting to directly compete with dairy products and [were] inappropriately taking advantage of the familiarity (and positive image) of dairy terminology in their labeling.”⁵³ Noting that soy-based beverages “are very different in nutritional value and composition from the standardized product described as milk in 21 C.F.R. 131.110,” NMPF asserted that “the true common or usual name for these products is ‘Soy beverage’ or ‘Soya drink,’ since they have traditionally been marketed as such, and, in fact, many firms continue to do so.”⁵⁴ NMPF failed to recognize that “soy milk” is as common a name, if not more so, than those other terms in marketing soy-based milk.

While the FDA declined to provide a substantive response to either Soyfoods or NMPF, it did on at least two occasions (in 2008 and 2012) issue warning letters to plant milk companies expressing the opinion that selling products using the term “soy milk” is in violation of FDA regulations.⁵⁵ In its 2008 letter to Lifesoy, Inc., a soy milk company, the FDA stated: “[W]e do not consider ‘soy milk’ to be an appropriate common or usual name because your product does not contain ‘milk.’ We consider ‘soy drink’ or ‘soy beverage,’ however as acceptable common or usual names for such products.”⁵⁶

These FDA warning letters fall short of providing the sort of clarity that would bring an end to the milk wars, however. Because FDA letters are “informal and advisory” rather than binding, the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See FDA Warning Letter to Lifesoy, Inc. (Aug. 8, 2008), <https://web.archive.org/web/20111230001302/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048184.htm> [<https://perma.cc/9ZLU-HKSE>]; see also FDA Warning Letter to Fong Kee Tofu Co., Inc. (Mar. 7, 2012), <https://web.archive.org/web/20171115101811/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm295239.htm> [<https://perma.cc/BHG5-LAE4>] (the letter to Fong Kee Tofu Co. reads, in pertinent part, “Your Fresh Soy Milk Sweet product uses the term ‘milk’ as a part of the common or usual name. Milk is a standardized food defined in 21 C.F.R. 131.110 as the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows. Therefore, we do not consider ‘soy milk’ to be an appropriate common or usual name because your product does not contain ‘milk.’ We consider ‘soy drink’ or ‘soy beverage,’ however as acceptable common or usual names for such products.”).

⁵⁶ See FDA Warning Letter to Lifesoy, Inc., *supra* note 55.

companies that received the letters are not legally compelled to stop selling products labeled with the term “soy milk.”⁵⁷ Indeed, not only have courts declined to defer to the FDA’s language in these warning letters,⁵⁸ but two recent court cases rejected the FDA’s reasoning altogether, highlighting the degree to which the word “milk” in the United States remains an active battleground.

*b. Class Action Lawsuits Seeking to Prohibit Plant
“Milk” Ended in Wins for Plant Milk Advocates*

Three recent cases out of California—including one decided by the U.S. Court of Appeals for the Ninth Circuit in December 2018—waded into the “milk wars” and all came out in favor of plant milk.⁵⁹ In the 2013 case *Ang v. WhiteWave Foods Co.*, plaintiffs brought a class action suit against prominent producers of nondairy food products—referred to as “Silk Products” because the products were sold under the brand “Silk”—alleging that the company has “misbranded” its plant-based products “by using names like ‘soymilk,’ [and] ‘almond milk’” because “the FDA defines ‘milk’ as a substance coming [exclusively] from cows.”⁶⁰ The *WhiteWave* court analyzed the plaintiffs’ claims under two related theories: first, that the defendants’ “use of terms ‘soymilk,’ ‘almond milk,’ and ‘coconut milk’ in the names of Silk Products violates the ‘standard of identity’ for milk,”⁶¹ and second, that “a reasonable consumer might confuse plant-based beverages such as soymilk or almond milk for dairy milk, because of the use of the word ‘milk.’”⁶²

⁵⁷ GFI Citizen Petition, *supra* note 28, at 26 n.69 (citing *Holistic Candler & Consumers Ass’n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012)).

⁵⁸ See *Ang v. WhiteWave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *3 (N.D. Cal. Dec. 10, 2013) (“[T]he brief statements in the two warning letters cited by Plaintiffs are far from controlling. This is especially true since the FDA regularly uses the term soymilk in its public statements . . . suggesting that the agency has yet to arrive at a consistent interpretation of § 131.110 with respect to milk substitutes.” (citations omitted)); see also *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-VC, 2015 WL 9121232, at *2–3 (N.D. Cal. Dec. 1, 2015) (“But even assuming FDA warning letters might sometimes enjoy deference, the statements in these letters about soymilk labels are entitled to none.” (citations omitted)).

⁵⁹ In a fourth case, the plaintiff based her claims on the argument that “Defendant’s Silk Almondmilk beverages [were] (1) mislabeled, in violation of § 101.3(e) because they should be identified as ‘imitation’ dairy milk; and (2) misleading because the use of the term ‘almondmilk’ misleads consumers.” *Kelley v. WWF Operating Co.*, No. 1:17-cv-117-LJIO-BAM, 2017 WL 2445836 at *2 (E.D. Cal. June 6, 2017). Finding that the doctrine of primary jurisdiction should apply, the court resolved the case by referring the case to the FDA. *Id.* at *6.

⁶⁰ *WhiteWave*, 2013 WL 6492353, at *1.

⁶¹ *Id.* at *3.

⁶² *Id.* at *4.

Addressing the first theory, the *WhiteWave* court rejected the plaintiffs' argument that the defendants were "attempt[ing] to impose new requirements concerning the standard of identity for milk."⁶³ Specifically, the *WhiteWave* court pointed out that the current standard of identity for milk, codified at 21 C.F.R. § 131.110, "pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives such as the Silk Products."⁶⁴ It also noted that the warning letters that the FDA sent to the defendants "are far from controlling," emphasizing that "[t]his is especially true since the FDA regularly uses the term soymilk in its public statements . . . suggesting that the agency has yet to arrive at a consistent interpretation of § 131.110 with respect to milk substitutes."⁶⁵

The *WhiteWave* court reasoned that because "the FDA has yet to prescribe a name for the Silk Products, the Court considers the 'common or usual name[s]' for those foods."⁶⁶ Explaining that FDA regulations allow for the common name established by common usage, the *WhiteWave* court held that product names like "soymilk" and "almond milk" accurately described the defendants' products, reasoning that "[a]s set forth in the [FDA] regulations, these names clearly convey the basic nature and content of the beverages, while clearly distinguishing them from milk that is derived from dairy cows."⁶⁷

Transitioning to the second theory, the *WhiteWave* court rejected the notion that consumers may be confused with the "soymilk," "almond milk," or "coconut milk" labels:

[I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products' names should be obvious enough to even the least discerning of consumers. And adopting Plaintiffs' position

⁶³ *Id.* at *3. The court noted that

FDA regulations require that a 'statement of identity' must be in terms of: (1) the name prescribed by federal law or regulation, '(2) [t]he common or usual name of the food; or, in the absence thereof, (3) [a]n appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food.

Id. at *3 (alteration in original) (quoting 21 C.F.R. § 101.3(b) (2013)).

⁶⁴ *Id.* at *3.

⁶⁵ *Id.* at *3 (citing FDA Enforcement Report, 2011 WL 6304352 (Dec. 14, 2011); FDA Enforcement Report, 2007 WL 4340281 (Dec. 12, 2007)). The FDA has itself characterized warning letters as "informal and advisory" in that it "communicates the agency's position on a matter, but . . . does not commit FDA to taking enforcement action." FDA, MAN-00007, REGULATORY PROCEDURES MANUAL, § 4-1-1, at 4 (2018), <https://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM074330.pdf> [<https://perma.cc/U6UD-BZBM>].

⁶⁶ *WhiteWave*, 2013 WL 6492353, at*4 (citing 21 U.S.C. § 343(i) (2012)).

⁶⁷ *Id.* at *4 (citing 21 C.F.R. §§ 102.5(a), (d) (2013)).

might lead to more confusion, not less, especially with respect to other non-dairy alternatives such as goat milk or sheep milk.⁶⁸

The *WhiteWave* court reasoned that confusion of the sort alleged by the plaintiffs was “highly improbable,” noting that the plaintiffs’ claim that a reasonable consumer may view a term like “soymilk” and “assume that the [drink] came from cows. . . . stretches the bounds of credulity.”⁶⁹ “Under the Plaintiffs’ logic,” the court concluded, “a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.”⁷⁰

In 2015 the Northern District of California revisited these same issues in *Gitson v. Trader Joe’s Co.*⁷¹ In that case, plaintiffs filed a class action against the grocery store chain Trader Joe’s alleging, among other things, that

the use of the word “soymilk” by Trader Joe’s to describe products that don’t contain cow’s milk violates the federal Food, Drug and Cosmetic Act, which in turn would constitute a violation of the California Sherman Act, which in turn would potentially be the basis for a claim under the “unlawful” prong of California’s Unfair Competition Law.⁷²

Noting that “[t]here are two potential theories for how the products could violate the federal statute,” the *Trader Joe’s* court rejected both of them.⁷³

The *Trader Joe’s* court rejected the first theory, that “the use of the word ‘soymilk’ is . . . ‘false or misleading’ within the meaning of 21 U.S.C. § 343(a),” by explaining that “whether a food label is ‘misleading’ is typically analyzed from the perspective of a reasonable consumer,” and concluding that the plaintiffs had not shown any plausible argument that the term “soymilk” is misleading.⁷⁴ The court identified two possible ways in which consumers may be confused or misled by the “soymilk” label: first, that “people might mistake soymilk for actual milk from a cow,” and second, that a consumer may believe that “the

⁶⁸ *Id.* at *4.

⁶⁹ *Id.* at *4.

⁷⁰ *Id.* at *4.

⁷¹ *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-VC, 2015 WL 9121232 (N.D. Cal., Dec. 1, 2015).

⁷² *Id.* at *1.

⁷³ *Id.* at *1.

⁷⁴ *Id.* at *1 (citing U.S. FOOD & DRUG ADMIN., GUIDANCE: QUALIFIED HEALTH CLAIMS IN THE LABELING OF CONVENTIONAL FOODS AND DIETARY SUPPLEMENTS, 2002 WL 32811482, at *5 (2002) (superseded on other grounds by U.S. FOOD & DRUG ADMIN., GUIDANCE: INTERIM PROCEDURES FOR QUALIFIED HEALTH CLAIMS IN THE LABELING OF CONVENTIONAL HUMAN FOOD AND HUMAN DIETARY SUPPLEMENTS, 2003 WL 24014304 (2003)) (“In assessing whether food labeling is misleading, FDA will use a ‘reasonable consumer’ standard.”)).

product has a similar nutritional content to cow's milk."⁷⁵ As for the first possible mode of confusion, the *Trader Joe's* court declared that it was "not plausible" that a consumer may mistake soymilk for actual milk from a cow, noting that "[t]he reasonable consumer (indeed, even the least sophisticated consumer) does not think soymilk comes from a cow. To the contrary, people drink soymilk in lieu of cow's milk."⁷⁶ In dismissing the second possible mode of confusion, the court held that "a reasonable consumer (indeed, even an unsophisticated consumer) would not assume that two distinct products have the same nutritional content; if the consumer cared about the nutritional content, she would consult the label."⁷⁷

In dismissing the second theory, that a "soymilk" product may violate federal law because it "purports to be or is represented as" a food that is already defined under the FDA standards of identity, the *Trader Joe's* court reasoned that "the fact that the FDA has standardized milk does not categorically preclude a company from giving any food product a name that includes the word 'milk.'"⁷⁸ Citing to 21 U.S.C. § 343(g), the *Trader Joe's* court explained that:

the standardization of milk simply means that a company cannot *pass off* a product as "milk" if it does not meet the regulatory definition of milk. Trader Joe's has not, by calling its products "soymilk," attempted to pass off those products as the food that the FDA has standardized (that is, milk). To the contrary, as already discussed, it is implausible that the use of the word "soymilk" misleads any consumer into believing the product comes from a cow. Soymilk, in short, does not "purport[] to be" from a cow within the meaning of section 343(g).⁷⁹

The *Trader Joe's* court noted that the FDA warning letters cited by the plaintiffs were not worthy of any deference, in part because such letters typically don't receive deference and in part because of the content of the letters themselves, which, as the court noted, referenced Trader Joe's use of the word soymilk "[a]lmost as an afterthought."⁸⁰ Noting that the warning letters "provide no support" for the argument that a product with the word soymilk in the title violates section 343(g) by purporting to be or representing itself as cow's milk, the *Trader Joe's* court

⁷⁵ *Id.* at *1.

⁷⁶ *Id.* at *1. (citing *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013)).

⁷⁷ *Id.* at *1.

⁷⁸ *Id.* at *2.

⁷⁹ *Id.* at *2 (citing 21 U.S.C. § 343(g) (2012)).

⁸⁰ *Id.* at *2.

concluded that the letters “do not support a claim that products with ‘soymilk’ in their titles violate the federal statute.”⁸¹

In December 2018, the Ninth Circuit weighed in on the milk wars, affirming the district court’s ruling in favor of plant milk producers and advocates.⁸² In that case, *Painter v. Blue Diamond Growers*, the plaintiff did not make the same sort of “standard of identity” claim seen in *WhiteWave* and *Trader Joe’s*.⁸³ Rather, the plaintiff made an “imitation food” claim, asserting that because Blue Diamond Growers’ (“Blue Diamond”) almond milk beverages “substitute for and resemble dairy milk[,] but are nutritionally inferior to it,” the beverages are mislabeled as “almond milk” and need to be either labeled “imitation milk” or fortified to be made nutritionally equivalent or superior to dairy milk.⁸⁴

The Ninth Circuit upheld the district court’s dismissal of the plaintiff’s claims on three grounds. First, it rejected the plaintiff’s contention that Blue Diamond needed to include either a nutritional comparison of almond milk to dairy milk or to stop using the term “milk” altogether, because these requirements are not imposed by the Food, Drug, and Cosmetic Act (FDCA) and the FDCA prohibits states from imposing labeling requirements that differ from federal requirements.⁸⁵

Second, the Ninth Circuit found that the plaintiff was unable to allege that Blue Diamond’s almond milk is mislabeled in violation of federal law.⁸⁶ Specifically, the court found that almond milk is not an “imitation” of dairy milk under federal law or regulations, notwithstanding any resemblance it may have to dairy milk “because almond milk does not involve literally substituting inferior ingredients for those in dairy milk.”⁸⁷

Finally, after recognizing that the plaintiff conceded that Blue Diamond accurately labeled and advertised its almond milk beverages, the court found “that ‘no reasonable consumer could be misled by [the company’s] unambiguous labeling or factually accurate nutritional statements.’”⁸⁸ Specifically, the court reasoned that “a reasonable jury could not conclude that almond milk is ‘nutritionally inferior’ to dairy milk within the meaning of 21

⁸¹ *Id.* at *2.

⁸² See *Painter v. Blue Diamond Growers*, No. 17-55901, 2018 WL 6720560, at *2 (9th Cir. Dec. 20, 2018).

⁸³ *Trader Joe’s*, 2015 WL 9121232, at *2; *Ang v. WhiteWave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *3 (N.D. Cal. Dec. 10, 2013).

⁸⁴ *Painter*, 2018 WL 6720560, at *1.

⁸⁵ *Id.* at *1.

⁸⁶ *Id.* at *2.

⁸⁷ *Id.* (citing 21 U.S.C. § 343(c) (2012); 21 C.F.R. § 101.3(e) (2018); 62 Cases of *Jam v. United States*, 340 U.S. 593, 595, 600 (1951)).

⁸⁸ *Painter*, 2018 WL 6720560, at *1 (quoting *Painter v. Blue Diamond Growers*, No. 17-02235-SVW-AJW, 2017 WL 4766510, at *2 (C.D. Cal. May 24, 2017)).

C.F.R. § 101.3(e)(4), as two distinct food products necessarily have different nutritional profiles.”⁸⁹ “[I]t is not plausible,” the Ninth Circuit concluded, “that a reasonable consumer would ‘assume that two distinct products have the same nutritional content.’”⁹⁰

Although these three recent cases came out in favor of plant milk,⁹¹ the next sections illustrate that while the milk wars continue to play out in Congress and at the FDA, it appears that plant milk producers and advocates may not enjoy the same victories they have experienced in the courts so far.

c. With Letter to the FDA, Congress Enters the Milk Wars on the Side of the Dairy Industry

In December 2016, on the heels of the *WhiteWave* and *Trader Joe’s* cases that unequivocally sided with advocates of plant milk, a bipartisan group of over two dozen lawmakers entered the milk wars.⁹² In a letter to the FDA arguing that “the use of the term ‘milk’ by manufacturers of plant-based products is misleading to consumers, harmful to the dairy industry, and a violation of milk’s standard of identity,” the congressmen asked the federal agency to “exercise its legal authority to investigate and take appropriate action against the manufacturers of these misbranded products.”⁹³

The congressmen’s letter unapologetically frames its arguments around a *pathos*-driven narrative designed to elicit sympathy for the plight of American dairy farmers. “As you know, dairy farmers are facing a serious financial crisis,” reads the topic sentence of the letter’s second paragraph.⁹⁴ Referring to dairy farmers as “hard working Americans,” the letter describes the “deep cuts in income” they have experienced “as milk prices have plunged [forty] percent since 2014.”⁹⁵ “Unless more is done,” the letter warns, “many more farmers will be forced to sell their herds.”⁹⁶

The letter goes on to note that sales of some plant-based products grew 250% in the previous five years compared with a

⁸⁹ *Id.* at *2.

⁹⁰ *Id.* (quoting *Painter v. Blue Diamond Growers*, No. 17-02235-SVW-AJW, 2017 WL 4766510, at *2 (C.D. Cal. May 24, 2017)). The Ninth Circuit also held that plaintiff’s “mislabeling” claims, which were brought under California state law and sought to impose labeling requirements distinct from those under 21 U.S.C. § 343(c), were preempted. *Id.*

⁹¹ At the time of this writing (April 2019) the author is not aware of any other ongoing court case directly tackling the milk wars.

⁹² See Welch Press Release, *supra* note 7; Welch-Simpson Letter, *supra* note 7.

⁹³ Welch-Simpson Letter, *supra* note 7.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

7% drop in sales of dairy milk in 2015.⁹⁷ “While consumers are entitled to choose imitation products,” the letter acknowledges, “it is misleading and illegal for manufacturers of these items to profit from the ‘milk’ name.”⁹⁸ Citing 21 C.F.R. § 131.110, the letter cautioned that “[p]lant-based products . . . fail to meet [the] standard of identity” for milk because “[t]hey are unable to match the nutritional makeup of the product they mimic.”⁹⁹ The solution, the congressmen argued, is for the FDA to “requir[e] plant-based products to adopt a more appropriate name that does not include the word ‘milk.’”¹⁰⁰

In a press release published the same day the congressmen sent their letter to the FDA, the International Dairy Foods Association (IDFA) and NMPF “thanked lawmakers for speaking out on the issue.”¹⁰¹ The press release goes on to say that

[i]n the many years since we first raised concerns about the misbranding of these products, we’ve seen an explosion of imitators attaching the word “milk” to everything from hemp to peas to algae. We don’t need new regulations on this issue, we just need FDA to enforce those that have been on the books for years.¹⁰²

Those powerful lobby groups would have even more to celebrate the following month, when a bipartisan group of lawmakers introduced legislation that would seek to formally end the legal milk wars in favor of the dairy industry.

d. The DAIRY PRIDE Act Seeks Legislative End to Milk Wars in Favor of the Dairy Industry

In January 2017, Wisconsin Senator Tammy Baldwin introduced a bill that took the spirit of the congressmembers’ December 2016 letter to the FDA and sought to turn it into law. Known as the Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese To Promote Regular Intake of Dairy Everyday Act, or the DAIRY PRIDE Act, Bill S. 130 seeks “[t]o require enforcement against misbranded milk alternatives.”¹⁰³ Specifically, the Act seeks to amend the Federal Food, Drug, and

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *Dairy Organizations Applaud Congressional Letter to FDA Asking for Stricter Enforcement of Milk Labeling Standards*, NAT’L MILK PRODS. FED’N (Dec. 16, 2016), <http://www.nmpf.org/latest-news/press-releases/dec-2016/dairy-organizations-applaud-congressional-letter-fda-asking> [<https://perma.cc/6JRT-CW63>]. “You haven’t ‘got milk’ if it comes from a seed, nut or bean,” NMPF’s Chief Executive Officer (CEO) said. *Id.*

¹⁰² *Id.*

¹⁰³ DAIRY PRIDE Act, S. 130, 115th Cong. § 1 (2017).

Cosmetic Act “to prohibit the sale of any food that uses the market name of a dairy product, is not the milk of a hooved animal, is not derived from such milk, and does not contain such milk as a primary ingredient.”¹⁰⁴

The DAIRY PRIDE Act’s “findings” section focuses on the notion that while according to the 2015–2020 Dietary Guidelines for Americans “[d]airy products are an important part of a healthy diet for both children and adults,” over eighty percent of the U.S. population fails to consume the recommended daily allowance of dairy products.¹⁰⁵ The findings also allege that plant milks “often do not provide the same nutrition content as real milk, cheese, and yogurt derived from dairy cows.”¹⁰⁶

The Act’s “findings” also state, without any further explanation or justification, that “[p]lant-based products labeled as milk are misleading to consumers.”¹⁰⁷ This “misleading” argument is the same one that has been used against plant milk products in each of the lawsuits discussed above¹⁰⁸ and that the courts have so far rejected. The implication here is that the nutritional differences articulated in the other “findings” are the cause of the alleged confusion on the part of consumers, but this is not stated explicitly in the Act.¹⁰⁹

If passed, the real-world consequences of the DAIRY PRIDE Act would be twofold. First, the Act would for the first time unequivocally prohibit the sale of nondairy products that use the term “milk” or related terms (i.e., yogurt, cheese, etc.) on their labels.¹¹⁰ Second, the Act would broaden the definition of the term “dairy product” such that the word “milk” would no longer be limited to the lacteal secretion of one or more healthy cows, but could be applied to the lacteal secretion of sheep, goats, and any other hooved mammals—including, presumably, *unhealthy* cows.¹¹¹

As of March 2019, the DAIRY PRIDE Act was still stuck in committee and it remains unclear whether Congress is inclined to take it up and turn it into law anytime in the foreseeable future.¹¹² Plant milk and dairy advocates are not

¹⁰⁴ *Summary: S. 130–115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/130> [<https://perma.cc/B6F9-5BFQ>].

¹⁰⁵ S. 130, 115th Cong. § 2(1)–(3).

¹⁰⁶ *Id.* § 2(4)–(5). Specifically, the findings argue both that “vitamin D and potassium amounts vary across plant-based milk alternatives” and that “[t]he amount of calcium per calorie is lower for most plant-based alternative milk products.” *Id.* § 2(4).

¹⁰⁷ *Id.* § 2(6).

¹⁰⁸ *See infra* Section I.B.1.b.

¹⁰⁹ S. 130, 115th Cong. § 2(8).

¹¹⁰ *Id.* § 3.

¹¹¹ *Id.* § 4(2).

¹¹² Senator Baldwin reintroduced the DAIRY PRIDE Act in the 116th Congress in March of 2019. DAIRY PRIDE Act, S.792, 116th Cong. (2019). As of this writing, it is

waiting to find out, however, and the milk wars continue playing out in the legal system and on grocery store shelves alike.

e. In Seeking Regulatory Clarity for the Naming of All “New Foods,” GFI’s Citizen Petition to the FDA Seeks Win for Plant Milk Advocates

In March 2017, the Good Food Institute¹¹³ (GFI) filed a Citizen Petition with the FDA requesting that it “issue a regulation clarifying that new foods may be named by reference to other ‘traditional’ foods in a manner that makes clear to consumers their distinct origins or properties.”¹¹⁴ GFI argued that “the practice of using such names is well-established in the marketplace, and consumers easily understand and accept such common or usual names for a wide variety of products.”¹¹⁵ GFI argued that using this approach of combining the common or usual name of another food preceded by a qualifying word or phrase that identifies the food as an alternative to that other food (such as “soy milk”) would not violate existing laws, and crafted proposed regulatory language explicitly stating that this practice “does not violate section 403 of the act or regulations of this chapter” so long as “the entire name

still in committee. See *DAIRY PRIDE Act S.792–116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/792/> [<https://perma.cc/9QUM-LTPX>](listing “latest action” as “Read twice and referred to the Committee on Health, Education, Labor, and Pensions”).

¹¹³ “The Good Food Institute is a 501(c)(3) nonprofit organization that is working toward a healthy, humane, and sustainable food supply, by publicly advocating for and encouraging research into alternatives to conventional animal foods.” GFI Citizen Petition, *supra* note 28, at 1 n.1.

¹¹⁴ GFI Citizen Petition, *supra* note 28, at 2.

¹¹⁵ *Id.*

Specifically, GFI request[ed] that the FDA amend 21 C.F.R. § 102.5 to add the following language after part (d):

(e) The common or usual name of a food may be—

(1) the common or usual name of another food preceded by a qualifying word or phrase that identifies (i) an alternative plant or animal source that replaces the main characterizing ingredient(s) or component(s) of such other food, or (ii) the absence of a primary characterizing plant or animal source, or of a nutrient, allergen, or other well-known characterizing substance, that is ordinarily present in such other food; or

(2) any other word or phrase comprised of two or more terms, which may be separated by hyphens or spaces; but if such name includes the common or usual name of any other food, it must effectively notify consumers that the product is distinct from such other food.

Id.

serves to notify a reasonable consumer that the product differs from such other food.”¹¹⁶

GFI’s Citizen Petition provides an in-depth analysis of its reasoning why the FDA should adopt the standard it proposes; it is worth unpacking here in order to understand the range of arguments being made by plant milk advocates in the regulatory arm of the U.S. milk wars. It argues that “GFI’s proposed language is consistent with the FDCA [Federal Food, Drug, and Cosmetic Act], and . . . embodies FDA’s policies and practices.”¹¹⁷ In order to show how its proposed language is consistent with the FDCA and FDA regulations, GFI analyzes the scope of “(1) the Act’s protection of standards of identity for certain foods; (2) the Act’s requirement that products bear their common or usual name; and (3) the Act’s provision regarding ‘imitation’ foods.”¹¹⁸ A closer look at GFI’s analysis is helpful in understanding how linguistic and cultural norms shape plant milk advocates’ arguments that there is nothing misleading about terms like “almond milk.”

i. GFI’s Analysis of the Scope of FDCA’s Protection of Standards of Identity for Certain Foods

Focusing on three common words that all have established standards of identity in the United States—“bread,” “noodles,” and “butter”—GFI walks the reader through a number of examples where food products that were either newly invented or were imported from other parts of the world actually bear a resemblance to food commonly found in the United States.¹¹⁹ As a result, the products are given names that reference “such familiar and ‘traditional’ products by adding a qualifying term in front of the name of the traditional product.”¹²⁰ From “rye bread, cornbread, and potato bread”¹²¹ to “soba noodles” and “ramen noodles”¹²² to “almond butter [and] cashew butter,”¹²³ GFI argues that “[n]o consumers purchasing these diverse offerings are deceived or confused by the fact that they are labeled ‘___ bread’ [or ‘___ noodles’ or ‘___ butter’] even if the products do not conform to the

¹¹⁶ *Id.* GFI also requested that the “FDA, in the interim while undertaking the proposed rulemaking, publish guidance for industry clarifying that such product names may generally be used, consistent with the proposed regulation and the contents of this petition.” *Id.*

¹¹⁷ *Id.* at 16.

¹¹⁸ *Id.* at 16.

¹¹⁹ *Id.* at 7–13.

¹²⁰ *Id.* at 7–13.

¹²¹ *Id.* at 8.

¹²² *Id.* at 9.

¹²³ *Id.* at 10.

standard of identity for ‘bread’ [or ‘noodles’ or ‘butter’].”¹²⁴ GFI’s core argument is that the “qualifying term” immediately preceding the word that has a specific standard of identity—such as bread, noodles, or butter—provides consumers with enough clarity to understand that that the product *with* the qualified term is different from (unqualified) “bread” or “noodles” or “butter.”¹²⁵

GFI argues that the same holds true for milk.¹²⁶ Specifically, it argues that

although the (unqualified) term ‘milk’ has a standard of identity that refers exclusively to cow’s milk, consumers have long understood that various compound terms of the form ‘_____ milk’ or ‘milk of _____’ refer to distinct products unrelated to cow’s milk. (Goat milk, buffalo milk, coconut milk, almond milk, or milk of magnesia, to name a few.).¹²⁷

GFI also rejects the argument that consumers may be confused or misled by products with these qualified names, and points to consumer research that indicates that “practically all consumers who have heard of these products (including those who do not consume them) are aware of their basic nature as cow’s milk alternatives that do not contain cow’s milk.”¹²⁸

In analyzing whether and when “food names that incorporate the names of standardized food” violate the FDCA, GFI points to 21 U.S.C. § 343, the section on “Misbranded food,” as a common starting point.¹²⁹ Specifically, § 343(g) defines a food as

misbranded if it “purports to be or is represented as a food for which a definition and standard of identity has been prescribed . . . unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard.”¹³⁰

The central question then, is whether a food name that includes the name of a standardized food along with a “qualifying term” must be seen as food that “purports to be or is represented as” the standardized food.”¹³¹ Because “[b]y their own terms, standards of identity only govern *unqualified* food names,” GFI

¹²⁴ *Id.* at 8.

¹²⁵ *Id.* at 7–13.

¹²⁶ *Id.* at 10.

¹²⁷ *Id.* at 10 (footnote omitted).

¹²⁸ *Id.* at 12 (citing Soyfoods Ass’n of North America, *Summary of Research on Consumer Awareness of Soymilk and Dairy Milk*) “In this 814-consumer survey conducted in 2006, the share of consumers who answered that they believe ‘cow’s milk’ is an ingredient in ‘soymilk’ was less than 0.5%, with approximately 3% reporting ‘milk’ as an ingredient.” *Id.* at 12 n.30.

¹²⁹ *Id.* at 17 (citing 21 U.S.C. § 343(g) (2012)).

¹³⁰ *Id.* (alterations in original).

¹³¹ *Id.* at 17.

asserts that “[t]he clear answer, as FDA and courts have long recognized, is no.”¹³²

*ii. GFI’s Analysis of the Scope of FDCA’s Requirement
That Products Bear Their Common or Usual Name*

GFI also argues that the FDCA’s section on Common or Usual Names,¹³³ combined with the FDA’s regulations, stated policies, and actual practices, already allow for terms such as cashew butter, rice noodles, and soymilk.¹³⁴ GFI laments, however, that one of the FDA provisions, 21 C.F.R. § 102.5(a), is “unfortunately somewhat vague and open to subjective interpretation.”¹³⁵ That provision states that a product’s common or usual name “may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name.”¹³⁶ Because it is so difficult to identify when a name is “confusingly similar” or “not reasonably encompassed within” another name, it is this provision that GFI proposes amending.¹³⁷ Even without its proposed amendment, however, GFI argues that “FDA’s stated policies and actual practices” make clear that the agency currently does not believe that consumers will be misled or confused by products whose name is comprised of a phrase that includes the name of a commonly-known food along with qualifying language and other identifying information on the label.¹³⁸

*iii. GFI’s Analysis of the Scope of FDCA’s Provision
Regarding “Imitation” Foods*

Lastly, recognizing that NMPF, among others, considers products like “soymilk” and “almond milk” to be “imitations” under the FDCA and related regulations, GFI’s Citizen Petition provides a thorough analysis explaining why it rejects this position.¹³⁹ GFI argues that NMPF’s best argument—that soymilk is an “imitation” of cow’s milk “because [it] *looks* like cow’s milk and is used in similar [contexts]”—is ultimately insufficient for two main reasons.¹⁴⁰ First, this argument

¹³² *Id.* (emphasis original) (footnote omitted) (citing 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951)).

¹³³ 21 U.S.C. § 343(i) (2012).

¹³⁴ GFI Citizen Petition, *supra* note 28, at 19–23.

¹³⁵ *Id.* at 20.

¹³⁶ 21 C.F.R. § 102.5(a) (2018).

¹³⁷ GFI Citizen Petition, *supra* note 28, at 20–21.

¹³⁸ *Id.* at 21–23.

¹³⁹ *Id.* at 23–27.

¹⁴⁰ *Id.* at 25 (emphasis original). GFI notes that the “FDA uses the catchall term ‘organoleptically’—pertaining to all senses, including sight, taste, touch, and smell—to

“completely ignores other ‘organoleptic’ factors (like taste, smell, and texture) that are manifestly different to anyone who has compared” plant milk to cow’s milk.¹⁴¹ Second, NMPF’s argument would lead to the absurd result of countless products, from rye bread to goat milk, being deemed “imitation” “because both products look very much like their wheat [and cow milk] counterparts and are used in the same way.”¹⁴² Requiring such products to be labeled “imitation bread” and “imitation milk” would, in GFI’s opinion, “be nonsense.”¹⁴³

At bottom, the essence of GFI’s overall argument is that “the addition of one word to another to form an entirely different word with a new meaning[] is not just a matter of how marketing works—it is simply a matter of how language works.”¹⁴⁴ It asks the FDA to recognize that fact by adopting GFI’s proposed language, which it argues is “consistent with the FDCA” and “embodies FDA’s [existing] policies and practices.”¹⁴⁵ Whether the FDA will adopt GFI’s proposed language remains to be seen, but a finding that compound phrases such as “soymilk” or “almond milk” are misleading and therefore prohibited would fly in the face of long-established linguistic and cultural norms around the way people refer to plant milk.¹⁴⁶

*f. NMPF’s Response to GFI’s Citizen Petition and
October 2017 Letter to the FDA*

In response to GFI’s Citizen Petition, NMPF filed a formal opposition in August 2017. In it, NMPF laments that the “FDA has heretofore failed to effectively enforce standards of identity for common and usual foods”¹⁴⁷ and argues that “[p]lant-based drinks and beverages that are marketed using dairy terms are imitation products but, under FDA’s current lack of regulatory enforcement in this area, are ones that do not properly acknowledge their imitation status.”¹⁴⁸ NMPF argues that these products are

determine whether a food is a ‘substitute for’ another food in deeming it an ‘imitation.’” *Id.* at 24 (citing 21 C.F.R. § 101.13(d)).

¹⁴¹ *Id.* at 25.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.* at 16. GFI also makes a First Amendment argument not discussed in this article. *Id.* at 27–34. In short, GFI argues that “[f]orbidding producers and sellers of products like soymilk or almond milk from using such names would be a restriction on protected commercial speech, and would be subject to judicial scrutiny under the First Amendment.” *Id.* at 28 (footnote omitted).

¹⁴⁶ See, e.g., Kemper, *supra* note 6.

¹⁴⁷ See NMPF Opposition, *supra* note 18, at 8.

¹⁴⁸ *Id.* at 4.

misbranded under the FDCA and FDA regulations and asks that the FDA enforce existing laws and regulations as written and reject GFI's proposed amendments to the regulations.¹⁴⁹

NMPF takes issue with GFI's assertion that it is wrong to characterize plant milks as substances that may confuse or mislead consumers because virtually everybody understands that these products do not come from cows.¹⁵⁰ NMPF concedes that consumers are likely to understand the plant-based nature of these products and instead argues that the companies who sell these products "seek to . . . bask in the halo of the reputation that milk and other dairy products have for providing healthful protein and essential nutrients."¹⁵¹ Asserting that "[m]ilk and other real dairy products are among the most common foods consumed by humans over many millennia, and have established well-deserved reputations for nutritional value,"¹⁵² NMPF accuses plant milk manufacturers of "sleight of hand marketing," arguing that what misleads consumers is the "inherent suggestion" that plant milks "have comparable nutritional [profiles] to those of dairy milk."¹⁵³

NMPF rejects GFI's argument that FDA "standards of identity govern only *unqualified* food names."¹⁵⁴ Arguing that GFI mischaracterized the only case—*62 Cases of Jam*¹⁵⁵—it relied on to make this point, NMPF makes a statutory construction argument that "[n]othing in the statute authorizing the promulgation of standards of identity, nothing in either 21 U.S.C. § 341 or in 21 U.S.C. § 343(g)" indicates that only "unqualified" names are governed by standards of identity.¹⁵⁶ It cites *62 Cases of Jam* for the proposition "that in reading a statute, we are 'neither to add nor to subtract, neither to delete nor to distort.'"¹⁵⁷

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 5. NMPF points to a study that compared the nutritional profile of dairy and plant milks and asserts that

the results from this study demonstrated that: (1) none of these products is nutritionally equivalent to real milk or delivers those nine essential nutrients as real milk does; and (2) unlike real milk's consistent nutrient package, there was extremely wide variation both within and among the various categories of plant-based beverages.

Id. at 5–6.

¹⁵⁴ *Id.* at 12 (internal quotation marks omitted) (quoting GFI Citizen Petition, *supra* note 28, at 17) (emphasis in original).

¹⁵⁵ *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951) (holding that a product sold as Delicious Brand Imitation Jam was not "misbranded" despite not meeting the standard of identity for "jam" because it unambiguously and accurately marketed itself as a distinct product through use of the qualifying word "imitation").

¹⁵⁶ NMPF Opposition, *supra* note 18, at 13.

¹⁵⁷ *Id.* (quoting *62 Cases of Jam*, 340 U.S. at 596).

In what seems to be the crux of NMPF's argument, it argues that "[a]dding the name of a plant material in front of the word 'milk' does not result in appropriate names for non-dairy products" because they "do not contain milk" and "[do not] represent the common or usual names of these beverages."¹⁵⁸ It is this last argument that stands out, because nowhere in its twenty-page Opposition does NMPF provide support for this contention. It does argue that "GFI's suggestion that the use of terms like 'soy milk' or 'rice milk' have become accepted in other countries is . . . incorrect," citing the 2017 European Court of Justice (ECJ) case *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH*, which held that plant-based products are prohibited from using the word "milk" in their labels or marketing in the European Union.¹⁵⁹ This case is discussed in more detail in below,¹⁶⁰ but insofar as it is relevant here, *TofuTown* fails to support NMPF's contention that terms like "soy milk" or "rice milk" have not "become accepted" in other countries. While *TofuTown* certainly illustrates the fact that the European Union *legally* prohibits plant-based products to use the word "milk" in their packaging, it says nothing about the extent to which these terms have "become accepted" in the everyday sense. As explained previously, the author has experienced that despite the *legal* prohibition of the word "milk" to refer to plant milk, that very word is in widespread use in the vernacular, both in casual conversation and written on the menus of virtually every café and coffee shop that offers a plant-based alternative to dairy milk.¹⁶¹ In other words, the existence of a legal prohibition of a product name is not evidence of the "common or usual" name of that product.

One of NMPF's final arguments in its response to GFI's Citizen Petition is that GFI's proposed amendment to FDA regulations is "unnecessary."¹⁶² Noting that product names like "rice drinks" and "almond beverages" and other "fanciful names that do not have 'milk' included in the name of the food on the front of the package"¹⁶³ already exist in the U.S. marketplace, NMPF argues that plant milk companies can either "choose unique names that describe their products by reference to actual content, or creatively

¹⁵⁸ *Id.* at 11 (emphasis added).

¹⁵⁹ *Id.* at 15 (citing Case C- 422/16, *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH*, (June 14, 2017), <http://curia.europa.eu/juris/document/document.jsf?docid=191704&doclang=EN>) [<https://perma.cc/CB7F-9RK8>].

¹⁶⁰ See *infra* Section I.B.2.b.

¹⁶¹ See discussion *supra* note 36.

¹⁶² NMPF Opposition, *supra* note 18, at 16.

¹⁶³ *Id.* at 8.

or whimsically, without any reference to common food names for which standards of identity have been established” or identify themselves as “imitation” products under 21 U.S.C. § 343(c).¹⁶⁴

In October 2017, NMPF filed another correspondence with the FDA, this time responding to statements made by the FDA reflecting the agency’s “renewed interest in assuring [that] Americans have important and accurate information on food labels to make food purchasing decisions.”¹⁶⁵ This three-page letter made many of the same points contained in the Opposition to GFT’s Citizen Petition, and went a step further in its critique of the FDA and the consequences of its failure to enforce existing regulations.¹⁶⁶ NMPF argued that the lack of enforcement “has led to rampant consumer fraud related to the inferior nutrient content of these non-dairy products compared to their true dairy counterparts.”¹⁶⁷

In all of its arguments to the FDA, NMPF fails to recognize the longstanding cultural and linguistic history of referring to plant milk as “milk”—there is nothing “imitation” about it.¹⁶⁸ And as is discussed in detail below, this article argues that while a “creative” or “whimsical” product name like “mylk” may be more *preferable* for plant-based products than the word “milk” with an “i,” laws and regulations should not legally *prohibit* companies from using the word “milk” to market plant-based products if they choose to do so.

g. FDA Commissioner Remarks in July 2018 Indicate Dairy’s Likely Eventual Win in the Legal U.S. “Milk Wars”

“An almond doesn’t lactate, I will confess.”¹⁶⁹ With these words, uttered by FDA Commissioner Scott Gottlieb at the POLITICO Pro Summit on July 17, 2018, the FDA took a significant step toward siding with the dairy industry in the U.S. “milk wars.”¹⁷⁰ The following week, on July 26, 2018, Gottlieb released a formal statement “on the process [the] FDA is undertaking for reviewing and modernizing the agency’s

¹⁶⁴ *Id.* at 16.

¹⁶⁵ See Letter from James Mulhern, President & CEO, Nat’l Milk Prods. Fed’n, to Dr. Scott Gottlieb, Commissioner, U.S. Food & Drug Admin. (Oct. 26, 2017), at 1, <http://www.nmpf.org/files/files/NMPF%20to%20Gottlieb%20Nutrition%20and%20Label%20Info%2010%2026%202017%20FINAL%20%28r1%29.pdf> [<https://perma.cc/XZ8F-D3WQ>].

¹⁶⁶ *Id.* at 3. “Time and time again,” NMPF wrote, “FDA has cited a lack of personnel and resources to address the flagrant and ever-escalating labeling violations. But to be frank, that excuse has never rung true.” *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Kemper, *supra* note 6.

¹⁶⁹ Nieves, *supra* note 10.

¹⁷⁰ See *id.*

standards of identity for dairy products.”¹⁷¹ In it, Gottlieb focused his remarks on the “wide variety of plant-based foods that are being positioned in the marketplace as substitutes for standardized dairy products,” noting that “some of these products can vary widely in their nutritional content—for instance in relation to inherent protein or in added vitamin content—when compared to traditional milk.”¹⁷² Referencing the “potential public health consequences” that come from plant-based products using the label “milk,” Gottlieb noted that the FDA “must better understand if consumers are being misled as a result of the way the term milk is being applied and making less informed choices as a result.”¹⁷³

Noting that “as a regulatory agency, it’s not appropriate to unilaterally change our regulatory approach if we have a history of non-enforcement” and the “need to closely consider the potential First Amendment issues related to the different uses of these terms,” Gottlieb’s statement indicated that the FDA would be engaging in “an active public process for reviewing our standard and how consumers understand the use of terms like milk on both animal-derived and plant-based products.”¹⁷⁴ The statement explained that the FDA would likely “issu[e] guidance for industry and a new compliance policy outlining our enforcement approach” at some point over the next year.¹⁷⁵

From a series of court rulings siding with plant milk advocates to the introduction of the bipartisan DAIRY PRIDE Act favoring dairy to the FDA soliciting opinions on all sides of the issue, the legal, legislative, and regulatory battles of the U.S. milk wars are far from over. On August 22, 2018, the FDA extended the

¹⁷¹ Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on the Process FDA is Undertaking for Reviewing and Modernizing the Agency’s Standards of Identity for Dairy Products, (July 26, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm614851.htm> [<https://perma.cc/AJ7K-TFQT>]. Gottlieb’s statement was released the same day the FDA hosted a Public Meeting on FDA’s Comprehensive, Multi-Year Nutrition Innovation Strategy. See Agenda, U.S. Food & Drug Admin., Public Meeting on FDA’s Comprehensive, Multi-Year Nutrition Innovation Strategy, Docket No. FDA-2018-N-2382, (July 26, 2018), <https://www.fda.gov/downloads/Food/NewsEvents/WorkshopsMeetingsConferences/UCM614172.pdf> [<https://perma.cc/U7JP-CLTD>]. The NMPF and PBFA issued both press releases on the same day. See Press Release, Nat’l Milk Prods. Fed’n, NMPF Tells FDA: Review of Food Standards Should Start with Enforcement (July 26, 2018), <https://www.nmpf.org/july-26-nmpf-tells-fda-review-of-food-standards-should-start-with-enforcement/> [<https://perma.cc/EA38-5WHB>]; PBFA Testifies at FDA Meeting on Modernizing Food Labeling, PLANT BASED FOODS ASS’N (July 26, 2018), <https://plantbasedfoods.org/pbfa-testifies-at-fda-meeting-on-modernizing-food-labeling/> [<https://perma.cc/9GWW-VLYK>].

¹⁷² Press Release, U.S. Food & Drug Admin., *supra* note 171.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

deadline of its Request for Comments on its Comprehensive, Multi-Year Nutrition Innovation Strategy to October 11, 2018.¹⁷⁶ A total of 1,364 comments were received, the vast majority of them weighing in on the issue of the labeling of plant milk and reflecting a wide range of views and opinions on the issue.¹⁷⁷ In Europe, as the next section explores, plant milk has had less success in legal battles, but seems to be winning the culture wars.

2. European Milk Wars: Legal Battles and Cultural Wars

“It’s like milk, but made for humans.”¹⁷⁸ These seven simple words sparked one of the most contentious and fascinating battles of the European milk wars. From a legal perspective, plant milk lost the European milk wars decades ago and has been fighting losing battles ever since. But from a sociocultural perspective, it’s a different story altogether.

a. EU Regulations Prohibit “Milk” to Come from Plants

The European Union (EU) established regulations in 1987 that narrowly define “milk” as “exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom.”¹⁷⁹ The regulations establish a list of a few carefully delineated exceptions, including “coconut milk”¹⁸⁰; however, soy, almond, rice, oat, and other plant-based milks and dairy substitutes are prohibited from using “milk,” “yogurt,” and related terms under EU regulations.¹⁸¹

¹⁷⁶ Notice, The Food and Drug Administration’s Comprehensive, Multi-Year Nutrition Innovation Strategy; Extension of the Comment Period, 83 Fed. Reg. 42,513 (Aug. 22, 2018).

¹⁷⁷ See Comments to The Food and Drug Administration’s Comprehensive, Multi-Year Nutrition Innovation Strategy; Public Meeting; Request for Comments, Docket No. FDA-2018-N-2381 (Oct. 11, 2018), <https://www.regulations.gov/docket/Browser?rpp=25&po=0&det=PS&D=FDA-2018-N-2381&refD=FDA-2018-N-2381-0317> [<https://perma.cc/96W9-HNX5>].

¹⁷⁸ This is one of Swedish oat milk company Oatly’s marketing phrases that has been the subject of litigation and cultural debates in Sweden, and which has also been used by Oatly in British ad campaigns in the autumn of 2018. See Tim Lewis, *How We Fell Out of Love With Milk*, GUARDIAN (Nov. 11, 2018, 3:00 AM EST), <https://www.theguardian.com/food/2018/nov/11/how-we-lost-our-love-milk-alt> [<https://perma.cc/L5SY-AEMT>].

¹⁷⁹ See Council Regulation 1898/87, art. 2, 1987 O.J. (L 182) 36, 36 (EC).

¹⁸⁰ Commission Decision 2010/791/EU, annex I, 2010 O.J. (L 336) 55, 56 (citing Council Regulation 1234/2007, annex XII, 2010 O.J. (L 299) 1, 105 (EC)). The regulations also allow for the legal description of nondairy products such as “peanut butter,” “cream crackers,” and “shea butter.” *Id.*

¹⁸¹ See Council Regulation 1898/87, art. 2, 1987 O.J. (L 182) 36, 36, 38.

These products must use terms such as “soy beverage” or “oat drink” on their packaging.¹⁸²

The EU regulations defining the word “milk” differ from the U.S. standard of identity for “milk” in that the drafters of the EU regulations seem to specifically have anticipated the use of the word in relation to plants and sought to use the regulations to take a normative position in support of the dairy industry. The very title of Council Regulation (EEC) No. 1898/87 is “on the protection of designations used in marketing of milk and milk products.”¹⁸³ The regulation makes reference to the need to “protect” dairy milk and states that “appropriate labelling” that “prevent[s] the consumer from being misled will help this objective to be achieved.”¹⁸⁴ The regulations also state that “apart from the case of products the exact nature of which is known through traditional usage, it is also necessary to avoid any confusion in the mind of the consumer between milk products and other food products.”¹⁸⁵

The EU regulations state that they seek to protect not only the dairy industry but also “the consumer.”¹⁸⁶ The regulations also stipulate that “competing products enjoy a competitive advantage” to dairy milk “in terms of production cost,” and explain that the regulations are designed to “establish[] conditions of competition between milk products and competing products in the field of product designation, labelling and advertising which avoid any distortion.”¹⁸⁷ The regulations require that “competing products” either be labeled “imitation milk” or be fortified to be made nutritionally equivalent or superior to dairy milk, or it could label its product “imitation” milk.¹⁸⁸

Given this regulatory backdrop, it’s not surprising that plant milk advocates have not had the same success in the EU courtroom as they have had in the United States. The next sections discuss a case out of the European Court of Justice and another out of the Swedish Market Court, both of which resulted in *legal* victories for dairy milk, but not necessarily cultural ones.

¹⁸² *See id.* at 36.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

b. The TofuTown Case: Unlike Their U.S. Counterparts, EU Courts Enforce Existing Regulations to Protect Dairy Milk

In June 2017, the European Court of Justice (ECJ) issued an opinion that set it apart from its judicial counterparts in the United States. Specifically, where the *WhiteWave* and *Trader Joe's* courts declined to defer to FDA guidance and instead interpreted federal regulations to allow for plant-based substances to be called “milk,” the ECJ in *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH* narrowly interpreted EU regulations in a significant win for the dairy industry.¹⁸⁹

The plaintiff in the *TofuTown* case, *Verband Sozialer Wettbewerb eV* (VSW), “is a German association whose responsibilities include combatting unfair competition.”¹⁹⁰ “TofuTown is a company [that] produces and distributes vegetarian/vegan food [products],” including vegan products with the names “‘Soyatoo tofu butter,’ Plant cheese, ‘Veggie Cheese,’” and others.¹⁹¹ VSW sued TofuTown on the theory that in promoting its vegan products that contain words such as “milk,” “butter,” and “cheese,” TofuTown was infringing on competition rules.¹⁹² TofuTown argued that its advertising didn’t violate EU law both because

the way in which consumers understand those designations has changed massively in recent years, and . . . it does not use terms such as ‘butter’ or ‘cream’ in isolation, but always in association with words referring to the plant-based origin of the products concerned, for example ‘Tofu butter’ or ‘Rice Spray Cream.’¹⁹³

In deciding the case, the *TofuTown* court articulated the main issue as whether EU regulations:

must be interpreted as meaning that they preclude the use of the term ‘milk’ and the designations that the regulation reserves exclusively for milk products being used to designate a purely plant-based product in marketing or advertising even if those terms are expanded upon by clarifying or descriptive terms indicating the plant-based origin of the products concerned.¹⁹⁴

¹⁸⁹ Case C-422/16, *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH*, (June 14, 2017), <http://curia.europa.eu/juris/document/document.jsf?docid=191704&doclang=EN> [<https://perma.cc/S7KA-JR4Y>].

¹⁹⁰ *Id.* ¶ 15.

¹⁹¹ *Id.*

¹⁹² *Id.* ¶ 16.

¹⁹³ *Id.* ¶ 17.

¹⁹⁴ *Id.* ¶ 20.

The *TofuTown* court held that “it is clear” that “the term ‘milk’ cannot, in principle, be lawfully used to designate a purely plant-based product” under existing EU regulations which state that milk is “an animal product.”¹⁹⁵ The court also said that “it is clear” that adding a “clarifying or descriptive term[,]” such as “soy,” before the word “milk” is not permitted by the regulations, which only permit such additional words to indicate when a product has undergone “the addition and/or subtraction of its natural constituents,” and not “a total replacement of milk by a purely plant-based product.”¹⁹⁶

The *TofuTown* court rejected TofuTown’s allegations that the court’s interpretations “r[a]n counter to the principle of equal treatment.”¹⁹⁷ The court explained that one of the objectives of the relevant EU regulations is to “improv[e] the economic conditions for the production and marketing as well as the quality of” dairy milk and related products.¹⁹⁸ The court argued that its interpretation was consistent with achieving these objectives, noting that any other interpretation that allowed for plant-based products to use the label “milk” “would be contrary to the protection of consumers because of the likelihood of confusion which would be created. That would also be contrary to the objective of improving the economic conditions for production and marketing and the quality of ‘milk’ and ‘milk products.’”¹⁹⁹

In short, the ECJ in *TofuTown* chose to interpret the EU regulations as it did as much out of deference to the dairy industry as to any guiding principles of statutory construction. As the next section illustrates, however, a legal loss in the milk wars doesn’t necessarily preclude plant milk from declaring a different sort of victory.

c. Oatly vs. The Dairy Lobby: The Ultimate David and Goliath Story for the “Post-Milk Generation”?

“Our consumers have been fighting for us, they’ve been running this war for us.”²⁰⁰ These words, spoken by Toni Petersson, CEO of the Swedish oat milk company Oatly, signal a significant shift in the way the European milk wars are being fought, and may

¹⁹⁵ *Id.* ¶ 23.

¹⁹⁶ *Id.* ¶ 24.

¹⁹⁷ *Id.* ¶ 42.

¹⁹⁸ *Id.* ¶ 43.

¹⁹⁹ *Id.* ¶ 44.

²⁰⁰ Ally McCrow-Young, *Changing the World Through Consumption: The Contradictions of Political Engagement in the Case of Oatly*, EXCELLENT MSc DISSERTATIONS 2016: MEDIA AND COMMUNICATION STUDIES 153, 190 (Tina Askanius ed.) (Lund University Press 2017), http://staticcuris.ku.dk/portal/files/185181334/Excellent_MSc_Dissertations_digital_version.pdf [<https://perma.cc/X723-BL8L>].

capture the reason why, despite losing so many legal battles, plant milk in Europe is winning the cultural milk wars.

Oatly is a small, privately owned company headquartered in southern Sweden.²⁰¹ Its annual sales are dwarfed by those of Sweden's dairy companies, whose sales are roughly two hundred times greater than Oatly's each year.²⁰² Despite its small size, Oatly has been growing in prominence in recent years, both in Sweden and abroad. The company was founded in the mid-1990s and for many years has been a key player in the Scandinavian plant milk market: in Sweden, the majority of all plant milk sold is in the form of oat milk.²⁰³ The company has been expanding its reach over the last several years to countries beyond Scandinavia, including the United States; in January 2018 the *New York Times* ran a story called *The Humble Ascent of Oat Milk* that documented the buzz around the company's recent move into the U.S. market.²⁰⁴

While the rise in Oatly's prominence in Sweden and abroad is almost certainly due in part to the worldwide trend toward a greater interest in plant-based alternatives to dairy products²⁰⁵ as consumers seek products that adhere to their ethical and environmental concerns,²⁰⁶ it is its underdog role in a real-world David and Goliath story that perhaps more than anything helped put Oatly on the map.

²⁰¹ *About Oatly*, OATLY, <https://www.oatly.com/int/about-oatly> [https://perma.cc/WE5R-35U3].

²⁰² Peter Goddard, *A Name Is My Claim to Fame*, GODDARD.SE:BLOG (Sept. 18, 2017), <http://goddard.se/a-name-is-my-claim-to-fame/> [https://perma.cc/TJ85-ZMRN] ("In 2013, the turnover of the companies within Svensk Mjök amounted to SEK 21.3 billion, which represented 0.6% of Swedish GDP. Oatly on the other hand had a turnover of SEK 118 million in 2013, which represented a mere 0.55% of Svensk Mjök's revenue at that time The company's turnover rose from SEK 270 million in 2014 to SEK 365 million in 2015.").

²⁰³ Svenskarna köper allt mer vegetabilisk mjölk ("*Swedes Buy More and More Vegetable Milk*"), SVT NYHETER (July 19, 2017), <https://www.svt.se/nyheter/inrikes/svenskarna-koper-allt-mer-vegetabilisk-mjolk> [https://perma.cc/9VC5-LMSH] (explaining that oat milk accounts for two-thirds of all plant milk sales in Sweden, followed by soy milk and almond milk).

²⁰⁴ Bonnie Wertheim, *The Humble Ascent of Oat Milk*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/style/oat-milk-coffee-oatly.html> [https://perma.cc/R7Z8-B42D].

²⁰⁵ In the United States and UK, dairy consumption has declined roughly one percent a year for the last seventy years. See Scheherazade Daneshkhu, *Dairy Shows Intolerance to Plant-Based Competitors*, FIN. TIMES (July 14, 2017), <https://www.ft.com/content/73b37e7a-67a3-11e7-8526-7b38dcaef614> [https://perma.cc/2RTZ-WMYG]. In Sweden, there has been a similar decline in consumption over at least the last decade. See Jordbruksverket, *Per Capita Consumption of Milk in Sweden from 2007 to 2017 (in Liters)*, STATISTA (Jan. 2019), <https://www.statista.com/statistics/557618/per-capita-consumption-of-milk-in-sweden> [https://perma.cc/4QVG-JKNP].

²⁰⁶ See Wertheim, *supra* note 204 ("Because almonds require over six times as much water to grow as oats do, according to the Water Footprint Network, the choice to switch from almond milk to oat milk also seemed environmentally sensible to Mr. Markiewicz. To those participating in today's restrictive food culture, Oatly's lack of dairy, nuts, gluten, soy or genetically modified organisms (GMOs) is a plus.").

In 2014, the Swedish dairy lobby *LRF Mjöl*k (Federation of Swedish Farmers) sued Oatly in Swedish Market Court, accusing Oatly of misleading consumers.²⁰⁷ The case was dubbed “the milk wars” in Swedish media²⁰⁸ and, given the centrality of the role of dairy in everyday life and the extent to which dairy has long been bound up in Sweden’s cultural identity,²⁰⁹ the nation was transfixed as the case unfolded in the courts, the media, and online social media spaces.²¹⁰

While the Oatly case shared the “misleading consumers” allegation that is at the core of the U.S. milk wars, this particular battle was different because it was not actually over the word “milk”: Oatly already adhered to European Union regulations and referred to itself as an “oat drink” on its packages, and had even sold t-shirts with the words “post milk generation” on its website.²¹¹ Instead, *LRF Mjöl*k focused its allegations on the witty, and often humorous wording, Oatly used on its packages and website, claiming that those phrases misled consumers into believing that dairy milk is bad for humans.²¹²

“No milk. No soy. No badness.”

“No nothing that isn’t necessary.”

“It’s like milk, but made for humans.”

“It looks like milk but isn’t milk. It is made for humans (not baby cows).”

“[T]his is not a substitute for cream. It’s an upgrade.”²¹³

These are just some of the phrases on Oatly packages with which *LRF Mjöl*k took issue.²¹⁴ In a sixty-two page decision issued in November 2015 that tackled language, rhetoric, human psychology and the ability of the average Swede to grasp specific messages articulated in English, the Swedish Market Court largely sided with *LRF Mjöl*k, banning Oatly from using the phrases listed above on the grounds that they improperly claimed

²⁰⁷ See Oatly Swedish Market Court Verdict, *supra* note 12.

²⁰⁸ See discussion *supra* note 15.

²⁰⁹ See generally Linné & McCrow-Young, *supra* note 24; SHURTLEFF & AOYAGI, *supra* note 25.

²¹⁰ See McCrow-Young, *supra* note 200, at 155–56.

²¹¹ An image of senior citizens wearing “post milk generation” t-shirts appeared on Oatly’s homepage on December 1, 2017. OATLY, <https://web.archive.org/web/20171201040347/http://www.oatly.com/> [https://perma.cc/76TQ-XX7D].

²¹² Oatly Swedish Market Court Verdict, *supra* note 12, para. 8.

²¹³ *Id.* para. 8(1)–(7).

²¹⁴ *Id.* para. 8(1)–(7).

Oatly products to be superior to dairy products and implied that milk and other dairy products were unsuitable for humans.²¹⁵

The Swedish Market Court did not ban outright *all* of the phrases *LRF Mjöl*k took issue with, however. While the court rejected Oatly's claims that phrases like "full of goodness" and "liquid goodness" would not be perceived by consumers as health claims but as phrases referring to "ethical/moral/biblical goodness,"²¹⁶ the court said that these phrases would be allowed so long as they were accompanied by a specific health claim.²¹⁷

Other phrases, such as "Wherever and whenever you would find yourself drinking milk or using it in a recipe 'back in the day', you can use Oat Drink today" and "When should you use it? Whenever you would use old school milk from cows" were deemed permissible.²¹⁸ The court rejected *LRF Mjöl*k's argument that consumers will understand these phrases to mean that milk products are old-fashioned and belong in the past while oat-based foods are the modern alternative.²¹⁹ The court reasoned that while the phrases may convey to consumers that dairy milk is more "traditional" than oat-based alternatives, they do not carry negative connotations of dairy or imply that dairy products are outdated or belong only to the past.²²⁰

Perhaps the most interesting aspect of the Oatly case is what happened outside the courtroom. After the lawsuit was filed in October 2014, sales of Oatly skyrocketed while sales of dairy continued with their decline.²²¹ Oatly's 2013 sales amounted to SEK 118 million; they increased to SEK 270 million in 2014, and SEK 365 million in 2015; they were expected to be SEK 500

²¹⁵ *Id.* para. 1. Oatly faced fines of two million kronor (\$235,000) if it did not comply with the court's order. *Id.*

²¹⁶ *Id.* ¶ 73–77 The way Oatly claims to have used the word "goodness" here is not altogether different from the way the word "just" is used by another plant-based product that waged its own David and Goliath war and won: Hampton Creek's Just Mayo. As described in a 2015 Washington Post article: "about that 'Just' in the names—it doesn't mean 'exactly' or 'only.' It's 'just' as in, 'guided by reason, justice or fairness,' as explained on the product's label. This is moral mayo, [CEO Justin] Tetrick argues in a soaring manifesto on Hampton Creek's website, spoken in somber tones and set to a stirring soundtrack. This [is] mayo that will 'fundamentally change the world.'" Sarah Kaplan, *How Little 'Just Mayo' Took on Big Egg and Won*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/18/how-little-just-mayo-took-on-big-egg-and-won/?utm_term=.e4bb4b7f1806 [https://perma.cc/3ZJW-JCT8].

²¹⁷ Oatly Swedish Market Court Verdict, *supra* note 12, ¶¶ 187–95.

²¹⁸ *Id.* ¶¶ 176–81.

²¹⁹ *Id.* ¶ 177.

²²⁰ *Id.* ¶¶ 178–81.

²²¹ Katarina Gustafsson, *Oatly Riles Big Dairy: Nondairy Milk Producer Oatly Is Benefiting from an Industry Lawsuit*, BLOOMBERG BUSINESSWEEK (May 14, 2015, May 14, 2015), <https://www.bloomberg.com/news/articles/2015-05-14/swedish-oat-milk-producer-benefits-from-dairy-industry-lawsuit> [https://perma.cc/TVS7-8VZJ].

million in 2017.²²² European and Asian sales of Oatly increased by 37%, “with a 45% increase in Sweden alone.”²²³

Oatly’s creative director, John Schoolcraft, credits Oatly’s rise in sales to its unconventional strategy in response to the lawsuit:

Most companies would immediately back down, but because we felt we had just spoke the truth we published the entire 172-page lawsuit on our website and let the public decide. We had no idea what public opinion would be, but it quickly became a David versus Goliath situation where thousands of people began to support us because they could see it was a bully tactic. We then took a full-page ad out in the morning papers that explained that we had been sued and why and suddenly the milk vs oat war is making headline news. We went from niche to mainstream in part because of that lawsuit so in one sense we were quite fortunate.²²⁴

The public relations strategy referenced by Schoolcraft, to put news of the lawsuit front and center on Oatly’s website and advertising, earned it an award in Sweden’s oldest and largest communication competition in 2015.²²⁵ Two days before the Swedish Market Court announced its decision, Oatly’s founder Rickard Öste was named southern Sweden’s Entrepreneur of the Year.²²⁶

Noting that “[a]t the dozen or so companies he had run . . . he[] [had] never been sued before,” Oatly CEO Toni Petersson had this to say in the wake of the Oatly lawsuit: “My mistake. Maybe I should have tried it before.”²²⁷ Oatly co-founder Björn Öste agreed, saying the lawsuit was “the best thing that ever happened to the company, hands down” and referenced “all the big newspapers and editorial pages” that came about as a result.²²⁸

And here, it seems, lies the secret to Oatly’s success, the real reason why Oatly and plant milk may ultimately win Europe’s milk wars despite plant milk having officially lost just about every (legal) battle it has fought for over thirty years: the consumers who, in CEO Toni Petersson’s words, “have been

²²² *Id.*

²²³ *Id.*; see also Gillian Phair, *Signal of Change: Rise in Oat-Based Milk Sales Following Dairy Lobby’s Lawsuit*, FUTURES CTR. (May 20, 2015), <https://thefuturescentre.org/signals-of-change/3779/rise-oat-based-milk-sales-following-dairy-lobby-s-lawsuit> [<https://perma.cc/RM8P-FZSH>].

²²⁴ eatbigfish, *An Interview with the Creative Director of Oatly*, CHALLENGER PROJECT (Sept. 27, 2016), <https://thechallengerproject.com/blog/2016/oatly> [<https://perma.cc/FAX2-BZDX>].

²²⁵ GULDÄGGET, <https://guldagget.se/vinnare/oatly-dalig-stamning-i-kyldisken/> [<https://perma.cc/7NKB-EHGU>].

²²⁶ *Oatly-grundare årets främsta entreprenör i Sydsverige* (“Oatly Founder Is Southern Sweden’s Entrepreneur of the Year”), EY ENTREPRENEUR OF THE YEAR (Nov. 17, 2015, 10:40 PM CET), <http://news.cision.com/se/entrepreneur-of-the-year/r/oatly-grundare-arets-framsta-entreprenor-i-sydsverige,c9869367> [<https://perma.cc/P4H7-JL6N>].

²²⁷ Gustafsson, *supra* note 221.

²²⁸ McCrow-Young, *supra* note 200, at 190.

fighting for us [and] been running this war for us.”²²⁹ After news of the lawsuit broke, Oatly consumers waged a massive social media campaign to express their support for Oatly specifically and plant milk and plant-based products more broadly, along with their disapproval of the dairy industry.²³⁰ The company’s social media manager Sara Hansson echoed this sentiment, noting that “[w]hen we put the lawsuit on the net and told the story I think people did kind of the job for us to some point.”²³¹ By taking a role in the milk wars for the first time in such a leading and public way, consumers shone a light on “the global and local shifts in attitude surrounding sustainable food production and consumption, the instability of the position of cow’s milk, and the importance of individual action for political and social change.”²³² As this article explores below in its discussion of the power of verbal activism, individuals acting collectively are often the most powerful forces in cultural shifts in norms and attitudes, and the consumer and advocate response to the Oatly case is another example of that.

Today, while some of its old slogans have disappeared from its packaging, Oatly’s marketing strategy remains as provocative and witty as before. More importantly, they signal a narrative that explicitly rejects comparison to dairy milk: in addition to the “post milk generation” t-shirts it has sold on its webshop,²³³ slogans such as “Wow no cow,” and “Yes we are vegan, so?” are two of the many slogans regularly appearing on Oatly’s packages in 2017 and 2018.²³⁴ As the global demand for plant milk increases with each passing year, it seems that the secret to plant milk’s success may well be in rejecting comparisons to dairy and instead embracing the alternative and disruptive opportunities that plant milk presents.

3. Reflections on the Milk Wars on Both Sides of the Atlantic

At the time of writing this article, the milk wars are still very much being fought in both Europe and the United States. While the jury is still out, FDA statements in the summer of 2018 seem to indicate that dairy may emerge the winner of the

²²⁹ *Id.*

²³⁰ *Id.*; see also Linné & McCrow-Young, *supra* note 24, at 5.

²³¹ McCrow-Young, *supra* note 200, at 190 (internal quotation marks omitted).

²³² *Id.* at 156.

²³³ An image of senior citizens wearing “post milk generation” t-shirts appeared on Oatly’s homepage on December 1, 2017. OATLY, <https://web.archive.org/web/20171201040347/http://www.oatly.com/> [<https://perma.cc/R7B9-ZB2T>].

²³⁴ See GULDÄGGET, *supra* note 225; see also eatbigfish, *supra* note 224.

legal milk wars in the United States as it has thus far in Europe.²³⁵ But the outcome of the legal milk wars may ultimately matter less than the outcome of the *cultural* ones, which plant milk appears to be winning on both sides of the Atlantic.²³⁶

This article argues that plant milk should win the *legal* aspects of the U.S. milk wars for at least five reasons. First, as discussed above, the word “milk” has been linguistically associated with plant milk since the fourth century A.D.,²³⁷ and “milk” is, quite simply, the “common or usual name”²³⁸ of plant-based beverages around the world today, including in the United States.²³⁹ “No one owns the English language, and we’re not backing down,” Michele Simon, executive director of the Plant Based Foods Association, told the *New York Times* in August 2018 of her organization’s efforts to promote plant milk.²⁴⁰

Second, as noted by the *WhiteWave*, *Trader Joe’s*, and *Blue Diamond* courts, there is virtually no chance of consumers being confused or misled by plant milks being labeled “milk.”²⁴¹ While the amendments GFI has proposed to the FDA would clarify that such a nomenclature was permissible,²⁴² even without such legal clarification it is clear that even the most unsophisticated consumer would understand that the descriptive word (i.e., soy, almond, oat) appearing before the word “milk” signals *both* that the product does not come from a cow *and* that the nutritional profile may accordingly differ as a result. Nutrition labels allow consumers to compare nutritional compositions of different products at a glance.

To illustrate the absurdity of the “consumers may be confused or misled” argument in relation to using the word “milk” to refer to plant milk, one need look no further than “Grassmilk,” a product sold by Organic Valley, “America’s largest cooperative of

²³⁵ See discussion *supra* Sections I.B.1–2.

²³⁶ See Franklin-Wallis, *supra* note 5 (discussing the rise in popularity of plant milks in Europe and the United States).

²³⁷ *Plant Milks: Another Nutritional Trend?*, *supra* note 24.

²³⁸ “Common or usual name” is the relevant term of art used by the FDA in 21 C.F.R. § 102.5 (2018).

²³⁹ Kemper, *supra* note 6.

²⁴⁰ Nellie Bowles, *Got Milk? Or Was That Really a Plant Beverage?* N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/milk-nut-juice-plant-beverage-label.html> [<https://perma.cc/HP2V-EGRD>].

²⁴¹ *Painter v. Blue Diamond Growers*, No. 17-55901, 2018 WL 6720560, at *1 (9th Cir. Dec. 20, 2018); *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-vc, 2015 WL 9121232, at *1 (N.D. Cal. Dec. 1, 2015); *Ang v. WhiteWave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013).

²⁴² GFI Citizen Petition, *supra* note 28, at 2.

organic farmers and one of the nation's leading organic brands.”²⁴³ Unlike soymilk or almond milk, which come from soy beans and almonds respectively, “Grassmilk” does not come (directly) from grass. It is dairy milk “from cows that eat organic grass and dried forages.”²⁴⁴ One has to wonder how a product labeled “Grassmilk” is any less confusing to products labeled “soymilk” or “almond milk,” especially when there is a long-established tradition of using the “____ milk” structure to denote an alternative to cow’s milk. In other words, isn’t there more danger that consumers may mistake “Grassmilk” for milk that is made from grass than they would mistake “soymilk” for milk that comes from cows?

Third, the fact that an explicitly stated reason why dairy milk advocates, including the congressmen who wrote the letter to the FDA and the senators who introduced the DAIRY PRIDE Act, wish to prohibit plant milk from being labeled “____ milk” is out of a desire to protect and support the dairy industry is problematic to say the least. Referring to dairy farmers as “hard working Americans,” as the congressmembers’ letter to the FDA did,²⁴⁵ belies the fact that the U.S.-based farmers who grow soy, almond, oat, and other crops to produce plant milk are just as “hard working” and just as “American” as any dairy farmer. Given that sales of plant milks have been increasing as sales of dairy milk have been decreasing in recent years,²⁴⁶ despite the dairy industry’s strong support from federal lawmakers, it is unclear why those same lawmakers are unwilling to publicly support the growth of the plant milk industry and the “hard working Americans” who are responsible for the growing success of the industry despite the cards being stacked against them.

Fourth, as will be discussed in more detail below,²⁴⁷ any suggestion that dairy milk should have exclusive use of the “milk” label in part because U.S. federal dietary guidelines state that “[d]airy products are an important part of a healthy diet for both children and adults”²⁴⁸ ignores the reality that a majority of people of color cannot properly digest milk.²⁴⁹ As a result, these guidelines are crafted in a way that perpetuates what law

²⁴³ *Organic Valley Celebrates 30 Years, Embraces Change in New Era of Cooperation*, ORGANIC VALLEY (Mar. 10, 2018), <https://www.organicvalley.coop/newspress/organic-valley-celebrates-30-years-embraces-change-new-era-cooperation/> [https://perma.cc/QU99-VW47].

²⁴⁴ *Grassmilk*, ORGANIC VALLEY, <https://www.organicvalley.coop/products/milk/grass-milk/whole-grassmilk-non-homogenized-pasteurized-half-gallon/> [https://perma.cc/PA6E-ULUJ].

²⁴⁵ See Welch-Simpson Letter, *supra* note 7, at 1.

²⁴⁶ *Id.*

²⁴⁷ See *infra* Section II.B.2.

²⁴⁸ DAIRY PRIDE Act, S.130, 115th Cong. § 2(1) – (3).

²⁴⁹ Andrew Curry, *Archaeology: The Milk Revolution* 500 NATURE 20, 21 (July 31, 2013), <https://www.nature.com/news/archaeology-the-milk-revolution-1.13471> [https://perma.cc/T4U3-EY85].

scholar Andrea Freeman calls “food oppression,” or the “institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group.”²⁵⁰

The final reason why plant milk should win the legal aspects of the U.S. milk wars is a normative one, namely that “milk” should be defined by the cultural space it occupies and not by its ingredients or manner of production.²⁵¹ A representative of the “animal-free dairy” company Perfect Day, which uses a fermentation process to produce “the very same dairy proteins that cows make”²⁵² and a substance the company calls “milk” as a result, captured this idea:

I want the definition of milk to be based on its cultural significance, on the way people use it and interpret it, not on what’s in it, necessarily. And the reason is obvious. I mean, soymilk is milk, almond milk is milk, cow’s milk is milk.²⁵³

Plant milk’s meteoric rise in popularity among consumers in the United States and Europe in recent years alongside languishing dairy sales is a sure sign that plant milk is winning the *cultural* milk wars on both sides of the Atlantic. And as this article has shown, there’s no question that plant milk is—linguistically and culturally—*milk* to people and in languages all around the world.²⁵⁴ In the United States, some plant milk advocates even appear willing to face possible jail time over the issue of plant milk labeling. “I mean, what would happen if we did call it milk still?” asked Jon Reagan, owner of Cafe Beit in Brooklyn, New York, in an interview with the *New York Times*, reflecting on the possibility that the FDA or Congress may make it illegal for him to refer to plant milk as “___ milk.”²⁵⁵ “The owner of Cafe Beit was sentenced to 10 years,” he mused in a “fake newscaster voice,” explaining that he thought it was “stupid to have a law” on the issue and that the law existed “just because the milk industry’s afraid.”²⁵⁶ In a similar vein, Mark Garza, the manager of Brooklyn-based Swallow Cafe echoed Reagan’s sentiments: “We’ll still call it milk . . . [e]verybody’s going to call it that.”²⁵⁷

²⁵⁰ Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 UC IRVINE L. REV. 1251, 1253 (2013).

²⁵¹ See Kemper, *supra* note 6.

²⁵² PERFECT DAY FOODS, <http://www.perfectdayfoods.com/> [<https://perma.cc/F45X-7V3F>].

²⁵³ See Erik Jönsson, Tobias Linné, & Ally McCrow-Young, *Many Meats and Many Milks? The Ontological Politics of a Proposed Post-Animal Revolution*, 28 SCIENCE AS CULTURE 70, 79 (2019) (citing December 2014 interview with “Perfect Day representative”).

²⁵⁴ See, e.g., Kemper, *supra* note 6.

²⁵⁵ Bowles, *supra* note 240.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

For all these reasons and more, plant milk should emerge victorious in the current *legal* milk wars in the United States, just as it appears to be winning the *cultural* milk wars on both sides of the Atlantic. As will be discussed below, whether or not plant milk advocates should want to use the word “milk,” however, is a different matter altogether.

II. IS “MILK” WITH AN “I” EVEN A WORD WORTH FIGHTING FOR?

The swirling controversy around whether plant milk should be legally allowed to use the label “milk” raises another, more provocative, question: is “milk” with an “i” even a word worth fighting for? Milk has been bound up with ideas around health, wholesomeness, and purity for centuries,²⁵⁸ but a closer look reveals that milk has long had a sinister side. In fact, the link between milk, exploitation, and oppression runs long and deep.

In conjunction with the twentieth anniversary of the publication of her landmark work *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory*, ecofeminist scholar Carol J. Adams wrote that “we live in an oppressive world that creates interlocking oppressions based on race, sex, class *and* species.”²⁵⁹ This Part unpacks some of the ways in which this oppressive world within which we live uses milk with an “i” to create some of the interlocking oppressions that Adams refers to, and argues that while plant milk products should legally be allowed to be called “milk,” their advocates and producers may not want to.

A. *Milk and Patriarchy*

“Speak to your cow as you would a lady.”²⁶⁰ So went a popular motto among Wisconsin dairy farmers in the late nineteenth and early twentieth centuries.²⁶¹ While seemingly benign at first glance, this motto is revealing for the ways in which the male-dominated dairy industry viewed both cows and human women: as fragile creatures requiring a particular *way* of being spoken to.

²⁵⁸ Otomo, *supra* note 1, at 220 (“White in colour, milk was associated with purity (or perhaps, it is the association of purity with the colour white that derives from milk), which gave it a transcendental authority that perhaps made it attractive to a state seeking to validate its claim to power.”).

²⁵⁹ Carol J. Adams, *The Sexual Politics of Meat*, SCAVENGER (May 15, 2010) [hereinafter Adams, *Sexual Politics of Meat*], <http://www.thescavenger.net/feminism-a-pop-culture-sp-9560/57-fem2/288-the-sexual-politics-of-meat-73645.html> [<https://perma.cc/62N6-CYDW>] (emphasis original).

²⁶⁰ Deborah Valenze, *MILK: A LOCAL AND GLOBAL HISTORY 1* (Yale Univ. Press 2011).

²⁶¹ *Id.*

A number of scholars have written about Western patriarchal society's consumption of and relationship to milk as being "rooted in gender stereotypes, inequalities, and injustices."²⁶² As critical animal studies scholar Erika Cudworth has explained, farming is a practice deeply constituted through gender relations, a process she describes as having three dimensions.²⁶³ First, animals in the agriculture industries are "disproportionately female, or bred for specifically gendered attributes which might correspond to patriarchal constructions of masculinities and femininities."²⁶⁴ "Second, animals [may] be feminized metaphorically by workers within the industry."²⁶⁵ Third, the whole "form[] of human control of animal fertility, sexuality and reproduction" in dairy industry practices is deeply gendered.²⁶⁶

While it takes and has taken many forms, perhaps the most visible form of milk being used as a tool for patriarchy today is the way that human and nonhuman female bodies are portrayed in popular culture to perpetuate tropes of femininity as being inherently sexual and wholesome at the same time. Images such as sexy housewives, demure housewives, and pregnant supermodels with milk moustaches abound in milk advertising spanning the last sixty years, illustrating the ways in which male-dominated media constructs narratives around milk and femininity to simultaneously sexualize and domesticate human and nonhuman female bodies.²⁶⁷ The

²⁶² See Tessa Cunningham, *You Are What You Drink: A Feminist Critique of Milk and its Consequences for the Female*, 1 SLOTH: J. EMERGING VOICES IN HUMAN-ANIMAL STUD. (Mar. 2015), <https://www.animalsandsociety.org/human-animal-studies/sloth/sloth-volume-i-no-1-march-2015/you-are-what-you-drink-a-feminist-critique-of-milk-and-its-consequences-for-the-female/> [https://perma.cc/MMN5-32XD]. Cunningham's article references a number of scholars and works on the subject, including the following that are particularly instructive. See SISTER SPECIES: WOMEN, ANIMALS, AND SOCIAL JUSTICE (Lisa Kemmerer ed., 2011); Erika Cudworth, 'Most Farmers Prefer Blondes': *The Dynamics of Anthroparchy in Animals' Becoming Meat*, 6 J. CRITICAL ANIMAL STUD. 32, 33 (2008); Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 AMER. Q. 595, 595 (2013).

²⁶³ Cudworth, *supra* note 262, at 33.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ One milk ad from circa 1955 depicts a smiling blond woman in a short skirt holding ice skates alongside the text "Look better, Cook better." See *Got Milk (Ads)?, MUST BE THE MILK* (Mar. 28, 2014), <https://www.mustbethemilk.com/got-milk-ads/> [https://perma.cc/QY42-G3FV]. Another milk ad from the first half of the twentieth century depicts a cow dressed as a demure housewife who serves glasses of milk to her husband and child on a tray. See Richard Brown, *Borden Dairy Products Commercial*, no. 3, TEX. ARCHIVE OF THE MOVING IMAGE, https://www.texasarchive.org/library/index.php/Borden_Dairy_Products_Commercial,_no._3 [https://perma.cc/QY42-G3FV]. A Got Milk? ad from the 1990s featured pregnant supermodel Elle MacPherson with a milk moustache. See Charles Manning, *10 Supermodels You Forgot Were in the "Got Milk?" Campaign*, FASHION WEEK DAILY (Mar. 23, 2018), <https://fashionweekdaily.com/supermodels-got-milk/> [https://perma.cc/3W9P-KY9A].

sections below discuss other examples of ways in which patriarchy has used and continues to use milk as a tool of exploitation and control of female bodies and lives.

1. Female Bodies, Both Human and Animal, Are Exploited in a Patriarchal World

“The case of the animal is the case of the woman.”²⁶⁸ Edith Ward wrote these words in her review of Henry Salt’s book *Animal Rights* for the working-class, feminist newspaper *Shafts*.²⁶⁹ The year was 1892.²⁷⁰ Nearly a century later, in 1990, Carol J. Adams published her landmark work *The Sexual Politics of Meat*, a term she describes as capturing the “dangerous intersection of misogyny and speciesism.”²⁷¹ Adams’ work traces what she calls “the historic alliance of feminism and vegetarianism in Utopian writings and societies, antivivisection activism, the temperance and suffrage movements, and twentieth century pacifism” through to the present,²⁷² arguing that “[a] feminist-vegetarian critical theory begins . . . with the perception that women and animals are similarly positioned in a patriarchal world, as objects rather than subjects.”²⁷³

A central concept in *The Sexual Politics of Meat* is that of “the absent referent,” a term Adams says she politicized and that she has explained as “the fact and reality of oppression that disappears when someone’s life become someone else’s pleasure or convenience.”²⁷⁴ In relation to meat, the concept refers to the fact that

[b]ehind every meal of meat is an absence: the death of the animal whose place the meat takes. . . . The absent referent functions to cloak the violence inherent to meat eating, to protect the conscience of the meat eater and render the idea of individual animals as immaterial to anyone’s selfish desires. It is that which separates the meat eater from the animal and the animal from the end product. The function of the absent referent is to keep our “meat” separated from any idea that she or he was once an

²⁶⁸ CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* 219 (20th Anniversary ed. 2010).

²⁶⁹ *Id.*

²⁷⁰ Carol J. Adams & Lori Gruen, *Groundwork*, in *ECOFEMINISM: FEMINIST INTERSECTIONS WITH OTHER ANIMALS & THE EARTH* 7, 7 (Carol J. Adams & Lori Gruen, eds., 2014).

²⁷¹ Adams, *Sexual Politics of Meat*, *supra* note 259.

²⁷² ADAMS, *supra* note 268, at 217.

²⁷³ *Id.* at 219.

²⁷⁴ Carol J. Adams, *Politics and the Absent Referent in 2014*, EARTHLING LIBERATION KOLLECTIVE (Jan. 1, 2016), <https://humanrightsareanimalrights.com/2016/01/01/carol-j-adams-politics-and-the-absent-referent-in-2014/> [<https://perma.cc/AHK3-VF64>] [hereinafter Adams, *Politics and the Absent Referent*]; see also ADAMS, *supra* note 268, at 66–69.

animal, to keep something from being seen as having been someone, to allow for the moral abandonment of another being.²⁷⁵

The absent referent can also function metaphorically, which is how Adams characterizes the objectification of human female bodies in a patriarchal world. It is where “someone else’s oppression[] becomes a metaphor for another group’s oppression. Where being treated ‘like a piece of meat’ is, would be an example of the metaphor of the absent referent.”²⁷⁶ In other words, human and nonhuman female bodies have become inextricably linked through patriarchy and metaphor.

Adams is not the only scholar to have made the connection between the way women and (often female) animals are treated in a patriarchal world. In *Rape of the Wild: Man’s Violence against Animals and the Earth*, for example, feminist scholar Andrée Collard wrote that “[i]n patriarchy, nature, animals, and women are objectified, hunted, invaded, colonized [sic], owned, consumed, and forced to yield and to produce (or not).”²⁷⁷ But it is Adams’ term “feminized protein” that perhaps best captures the specific ways in which female bodies in particular are exploited within the patriarchal system within which the current animal industrial complex exists.

“Feminized protein” is a term designed to “highlight the role of female animals in producing milk and eggs” from the plants they eat.²⁷⁸ Adams defines it as “plant protein produced through the abuse of the reproductive cycle of female animals.”²⁷⁹ In a 2014 interview, Adams explained that

my concern is the aspect of patriarchal ethics that keeps living beings as absent referents. The female beings who are kept in reproductive slavery to produce eggs and milk for human beings. Ovransky famously talked about how for animals, their bodies are the means of production. And for female animals, their bodies are the means for production and reproduction. . . . What I’m interested in is the social construction of animals who are in reproductive slavery. I’m interested in the way this female reproductivity is framed.²⁸⁰

The next section discusses the “social construction” Adams refers to, and explores the ways in which, the specific feminized protein

²⁷⁵ *The Book*—Carol J. Adams CAROL J. ADAMS, <http://caroljadams.com/spom-the-book/> [<https://perma.cc/F6GL-82FT>].

²⁷⁶ Adams, *Politics and the Absent Referent*, *supra* note 274.

²⁷⁷ ANDRÉE COLLARD, *RAPE OF THE WILD: MAN’S VIOLENCE AGAINST ANIMALS AND THE EARTH 1* (Indiana Univ. Press 1989).

²⁷⁸ Adams, *Politics and the Absent Referent*, *supra* note 274; *The Book*—Carol J. Adams, *supra* note 275.

²⁷⁹ Adams, *Sexual Politics of Meat*, *supra* note 259.

²⁸⁰ Adams, *Politics and the Absent Referent*, *supra* note 274.

that is milk has been used as a tool to control and regulate female bodies throughout history—human and nonhuman alike.

2. Milk: The Ultimate Feminized Tool of Exploitation in a Patriarchal World

As was explained above,²⁸¹ the primary definition of the word “milk” in the Oxford English Dictionary echoes Adams’ concept of milk being a “feminized protein”: the word is, by its very definition, inherently female and animal in nature.²⁸² This definition is interesting from a feminist perspective for several reasons. First, it is actually possible for male bodies to lactate,²⁸³ but according to the prevailing dictionary definitions of the word, the substance they produced would not be considered “milk.” Second, this definition also excludes a range of other substances, like milk from plants. That definition is a few pages in,²⁸⁴ but is definitely not the dominant definition of the word.

The third interesting aspect of the way that the word “milk” has been constructed by our society to be explicitly female and animal in nature is that “milk” is also a word that by its very definition means “to exploit.” The Oxford English Dictionary defines the word as “to drain completely of resources; to exploit exhaustively.”²⁸⁵ And so, in “milk,” we have a word that by its very definition captures the relationship it has to the bodies it comes from.

That milk is symbolically and literally used as a tool of exploitation and regulation of human and nonhuman female bodies alike isn’t a novel idea, nor is it an idea that’s been extensively explored in scholarship. In *The Gentle Cannibal: The Rise and Fall of Lawful Milk*, law scholar Yoriko Otomo identified Carol Adams and fellow ecofeminist scholar Greta Gaard as exceptions to the general approach of scholars writing about the cultural and

²⁸¹ See *supra* Section I.A.

²⁸² *Milk*, OXFORD ENGLISH DICTIONARY (2018), (defined as “a whitish fluid . . . secreted by the mammary glands of female mammals (including humans) for the nourishment of their young.”).

²⁸³ See Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCI. AM. (Sept. 6, 2007), <https://www.scientificamerican.com/article/strange-but-true-males-can-lactate/> [<https://perma.cc/LS7R-Y5GW>].

²⁸⁴ There is a subsidiary definition of “milk” in the Oxford English Dictionary that encompasses the idea that milk can come from plants, but even that definition is written in such a way that it fails to recognize the widespread nature of plant milks in the human diet: “A milky juice or latex present in the stems or other parts of various plants, which exudes when the plant is cut, and is often acrid, irritant, or toxic. Also: *spec.* the drinkable watery liquid found in the hollow space inside the fruit of the coconut.” *Milk*, OXFORD ENGLISH DICTIONARY (2018).

²⁸⁵ *Id.* The complete definition is: “to drain completely of resources; to exploit exhaustively. To elicit (something), to draw *out*; to extract or extort (money, advantage, information, etc.) *from* a person, business, situation, etc.” *Id.*

economic histories of milk through the lens of *either* female human breastmilk or cow's milk—but not both.²⁸⁶ Adams' and Gaard's position differs from virtually all scholarship on the subject where “for the most part the two liquids and the two kinds of female bodies that produce them are treated as having nothing to do with one another” in that for both Adams and Gaard, “the issues underlying the control of both animal and human milk-producers are analogous.”²⁸⁷ Gaard, for example, shows how the colonial practices of multinational First World food and dairy corporations had “devastating effects on mothers and children, cows and calves, rural poor and small dairy farmers” when introducing dairy-based infant formula in developing countries.²⁸⁸

Otomo joins Adams and Gaard in seeing both human and nonhuman female bodies as being bound up in the ways in which our patriarchal world frames and consumes milk. She argues that the effect of society's ever-increasing consumption of cow's milk throughout history “has been to shape power relations between sexes, humans and animals, women and the state. It has severed us from the material, emotional, physiological and environmental conditions of production.”²⁸⁹ She argues that “[i]t has shaped *what* we eat, *who* we eat and *how* we eat—and what we are supposed to think, and not think, about it.”²⁹⁰ In coining the term “lawful milk,” Otomo explains that “[t]he cultural bond between the feeder and the fed has been reconfigured over time,” and that today, her understanding of “lawful milk” is milk “whose extraction and consumption produces lawful subjects and lawful cities, and whose global distribution acts as a nourishing and purifying force for human territory.”²⁹¹ Gaard makes a similar point when arguing for a feminist milk studies that can address “the bio-psycho-social connections” created through “the mother-infant bond[] and their *nursing* milk” regardless of species, but at the same time acknowledges how “[i]deologically imprisoned in a humanist colonial framework, few human mothers who breastfeed their infants use this embodied experience as an avenue for empathizing

²⁸⁶ Otomo, *supra* note 1, at 216 n.2. Mathilde Cohen is another scholar who whose work examines ways in which both human and nonhuman female bodies are bound up in the ways in which our patriarchal world frames and consumes milk; her work is discussed in the next section. See Mathilde Cohen, *Regulating Milk: Women and Cows in France and the United States*, 65 AM. J. COMP. L. 469 (2015) [hereinafter Cohen, *Regulating Milk*].

²⁸⁷ Otomo, *supra* note 1, at 216 n.2 (citing Carol J. Adams, *Pity the Poor Mad Cow: A View from the United States*, 3 ECOTHEOLOGY 117 (1997); Gaard, *supra* note 262)).

²⁸⁸ Gaard, *supra* note 262, at 604.

²⁸⁹ Otomo, *supra* note 1, at 227.

²⁹⁰ *Id.*

²⁹¹ *Id.*

with other mammal mothers.”²⁹² Speciesism²⁹³ acts as a powerful force to prevent humans—mothers and otherwise—from fully recognizing and problematizing the ways in which nonhuman female bodies are exploited by humans for their milk. But as the next section discusses, humans have long been exploited for their milk, too; perhaps a more widespread awareness of that fact might help conjure the sort of empathy Gaard laments we humans are currently lacking for our nonhuman brethren.

3. Regulating and Controlling Female Bodies and Lives Through Wet Nursing

While nonhuman female bodies are most commonly thought of as being the ones exploited in the milk industry, there is also a long history and tradition of regulating and exploiting human female bodies for their milk as well.²⁹⁴

The wet nursing industry²⁹⁵ dates back thousands of years and regulated not only women’s bodies but the innermost aspects of their private lives as well: there are examples from antiquity, 3000 B.C. to 700 A.D., where wet nurses entered into contracts imposing restrictions on their sexual activities and where they were subject to severe penalties if they got pregnant.²⁹⁶ In The Code of Laws by Hammurabi, King of Babylon, from 1720 to 1686 B.C., wet nurses faced the punishment of having their breast cut off if they were found to give their milk to a baby who was not the one they were contracted to feed.²⁹⁷ Further, in medieval Europe around the eleventh and twelfth centuries, wet nurses were subject to a

²⁹² Gaard, *supra* note 262, at 613.

²⁹³ Speciesism is “[d]iscrimination against or exploitation of certain animal species by human beings, based on an assumption of mankind’s superiority.” Speciesism, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/185996> [<https://perma.cc/49ND-CHF7>].

²⁹⁴ See Cohen, *Regulating Milk*, *supra* note 286, at 474 (“[C]ompar[ing] the emergent debate over the regulation of human milk to the age-old debate over animal milk regulation.”). Cohen emphasizes that while “[m]uch of human life and thinking, especially in Western cultures such as France and the United States, is concerned with distinguishing humans from other animals” and that therefore “[t]he analogy between human and animal milk is sure to offend some,” the work of “[a]nalogizing human to nonhuman females is not intended to debase ‘women,’ but to uncover the different, mutually reinforcing, forms of oppression intersecting gender and species.” *Id.* at 473–74.

²⁹⁵ A wet nurse is a woman who breastfeeds a child who is not her own. Women have served as wet nurses throughout history and across cultures, sometimes by force and sometimes by choice, either through paid work or in a voluntary capacity. See, e.g., VALERIE A. FILDES, WET NURSING: A HISTORY FROM ANTIQUITY TO THE PRESENT 8 (1988).

²⁹⁶ *Id.* The reasoning behind these prohibitions was because it was believed that both sex and pregnancy damaged or changed women’s breast milk and would harm the child who drank it. This means that wet nurses were required to suspend sexual relations with their husbands for long periods of time, up to a maximum of three years.

²⁹⁷ *Id.* at 24.

series of laws defining and regulating their behavior, including severe penalties for giving babies breastmilk contaminated by bad diet, sexual intercourse, or other failings identified by law.²⁹⁸ Men accused of having sex with a wet nurse and poisoning her milk could prove their innocence by fighting a duel, but the women those men allegedly had sex with would be considered guilty no matter the duel's outcome.²⁹⁹

Moreover, human milk was the most frequently advertised commodity in eighteenth century United States,³⁰⁰ but not all wet nurse milk was paid for at that time, as it was not uncommon for slaveholders to use their female slaves as wet nurses, sometimes requiring the slaves to stop breastfeeding their own children in order to give their milk exclusively to the children of their owners.³⁰¹

While the wet nursing industry in the United States declined throughout the nineteenth century, women's breastmilk remained a commodity in the form of "milk banks" that provided the milk to hospitals and other entities where human milk was in demand.³⁰² In the early twentieth century hospitals often ran wet nurse wards, where for eight dollars a week wet nurses stayed overnight and had their daily activities such as eating and bathing closely monitored by hospital staff.³⁰³

While their experiences are undoubtedly different in innumerable ways, there is value in considering the underlying connections between human wet nurses and female dairy cows. In *Regulating Milk: Women and Cows in France and the United States*, Mathilde Cohen examines "the woman-cow connection" in milk regulation in constructing "an ecofeminist argument" aimed at "uncover[ing] the different, mutually reinforcing, forms of oppression intersecting gender and species."³⁰⁴ She argues that "some of the social and legal norms that shaped the relationship of [humans] to animal milk equally apply to human milk."³⁰⁵ After posing the question "whether milk is a commodity being regulated or whether it is the female body (animal or human), as the site of gestation, generation, and lactation, that is the real center of attention,"³⁰⁶ Cohen thoughtfully examines why the latter is true.

²⁹⁸ *Id.* at 38.

²⁹⁹ *Id.*

³⁰⁰ JANET GOLDEN, A SOCIAL HISTORY OF WET NURSING IN AMERICA: FROM BREAST TO BOTTLE 27 (1996).

³⁰¹ *Id.* at 25; see also Cohen, *Regulating Milk*, *supra* note 286, at 484.

³⁰² GOLDEN, *supra* note 300, at 179.

³⁰³ *Id.* at 190–91.

³⁰⁴ Cohen, *Regulating Milk*, *supra* note 286, at 473–74.

³⁰⁵ *Id.* at 474.

³⁰⁶ *Id.* at 507.

Part of Cohen's argument is an economic one grounded in the recognition "that women's work and lives, like those of animals, have been exploited by male-dominated economic systems."³⁰⁷ "From this perspective," she argues,

the parallels between human and nonhuman females may have less to do with biology than with their position in society and the kind of work they do. Lactating humans resemble lactating animals as both have been historically undervalued and deprived of the recognition they deserve for their work, which has largely remained invisible. Like farm animal labor, historically, much of women's work has been embodied, repetitive, and spatially limited—housework, childcare (including breastfeeding), caring for the old, the sick, animals, and sexual nurturing. The oppression of cows is comparable, yet much crueler. Farm animals raised for milk are intensively confined, always on call to endlessly recycle the same tasks, continuously impregnated and milked, only to be slaughtered once they become infertile or substandard milk producers.³⁰⁸

Cohen also argues that "given the biological and cultural associations between milk and sexuality, [milk regulation] laws often have undertones of sexual control" and that "[m]ilk regulation tends to be really about repressing female sexual autonomy."³⁰⁹ She grounds this argument in the recognition that "much of the subordination and oppression of animals and women has been facilitated and legitimated by the discursive and material linking of these two groups," with "[l]actating [humans and other] animals [being] particularly illustrative of this dynamic, being feminized and sexualized through gendered processes involving human control over their fertility, sexuality, and reproduction."³¹⁰

Lastly, in *The Sexual Politics of Meat*, one of Carol Adams' final points is that "we proclaim and reinforce the triumph of male dominance by eating female-identified pieces of meat."³¹¹ "Eating animals," she argues, "acts as mirror and representation of patriarchal values"³¹² and exists to "legitimate a patriarchal world."³¹³ This article argues that the same is true of regulating and controlling the consumption of milk from female bodies, humans and nonhumans alike. And, as the next section discusses,

³⁰⁷ *Id.* (citing Mary Mellor, *Ecofeminist Political Economy*, 1 INT'L J. GREEN ECON. 139 (2006)).

³⁰⁸ *Id.* at 507–08 (footnote omitted).

³⁰⁹ *Id.* at 475.

³¹⁰ *Id.* at 513. Cohen also argues that the regulatory agendas in both the United States and France "are prompted by scientism," which she describes as "the readiness to see science as infallible, subjecting female bodies to its dominion under the guise of producing a safe, standardized product." *Id.* at 475.

³¹¹ ADAMS, *supra* note 268, at 242.

³¹² *Id.* at 241.

³¹³ Adams, *Sexual Politics of Meat*, *supra* note 259.

it's not only females who experience exploitation and oppression through milk: there is also a long history linking milk symbolically and literally to manifestations of white superiority.

B. *Milk and Race*

1. Historical Links Between Milk and Race

The connections between milk and race date back thousands of years. Prehistoric humans began extracting milk from other animals at least 8,500 years ago, marking the start of a practice that is inextricably bound up in dominance, power, and control.³¹⁴ In fact, it is not a stretch to say that the entire human enterprise of building power and growing societies has its roots in the economic benefits of the exploitation, exchange, and sale of nonhuman animals, with milk production playing a significant role in the process.³¹⁵

Exploiting other animals for their milk is a somewhat peculiar form of exploitation considering the fact that humans are the only animals that regularly drink the milk of other species, and the only species that drinks milk as adults. What makes it even more peculiar is that roughly sixty-five percent of the world's population is unable to digest the lactase found in unprocessed milk.³¹⁶

About 7,500 years ago a genetic mutation developed that allowed some populations to digest lactase into adulthood.³¹⁷ This mutation, known as "lactase persistence," was more prevalent in certain regions, with northern Europe being the largest such "lactase hotspot," followed by small pockets in the Middle East, western Africa, and part of the Indian subcontinent.³¹⁸

Lactase persistence allowed those with the mutation to exploit it on a grand scale. Not only did it provide them with a source of year-round nutrition when other food sources were scarce, but researchers also estimate that those "with the mutation [may] have produced up to [nineteen percent] more fertile offspring than those [without] it."³¹⁹ Anthropologist and molecular biologist Joachim Burger argues that "[w]ithout milk . . . everything would have been different. Thirty to [forty] per cent of the middle to northern

³¹⁴ Richard P. Evershed et al., *Earliest Date for Milk Use in the Near East and Southeastern Europe Linked to Cattle Herding*, 455 NATURE 528 (2008).

³¹⁵ See generally DAVID A. NIBERT, ANIMAL OPPRESSION AND HUMAN VIOLENCE: DOMESECRATION, CAPITALISM, AND GLOBAL CONFLICT (2013).

³¹⁶ Curry, *supra* note 249, at 20–21.

³¹⁷ *Id.* at 21.

³¹⁸ *Id.*

³¹⁹ *Id.*

European gene pool would have been different, different people would have taken over the continent, and so on.”³²⁰

Fast-forward a few thousand years and dairy milk remains today a central fixture of Western culture despite a majority of people of color not being able to digest it.³²¹ It’s hard not to see the lactase persistence of white northern Europeans as being bound up in the more sinister side of milk-drinking, with a particular form of institutionalized white dominance running through the entire dairy and broader animal agriculture industries, as well as the legal, political, and cultural framework that exists to perpetuate them.

A number of scholars have written about the ways in which food—including milk—came to play a significant role in colonial projects, particularly regarding the subjugation of people of color and the nonhuman animals who happened to occupy these colonized territories.³²² Sociologist David Nibert, who coined the word “domesecration” to describe the domestication of animals, argues that the phenomenon of domesecration can be linked to “violence, invasion, extermination, displacement, enslavement, repression, and pandemic chronic disease.”³²³ He situates the domesecration of animals as a precondition for the oppression of human populations, particularly indigenous peoples, and argues that conquest and subjugation of people and animals were the result of the colonizer’s perceived “need to expropriate the land and water necessary to maintain large groups of animals.”³²⁴ He also argues that “the [gross] amassing of military power” has its roots in the economic benefits of the exploitation, exchange, and sale of nonhuman animals.³²⁵

Likewise, in *Animal Colonialism: The Case for Milk*, law scholar Mathilde Cohen argues that “lactating animals became integral parts of colonial and neocolonial projects as tools of agroexpansionism and human population planning.”³²⁶ Coining the term “milk colonialism,” Cohen refers to milk as a “conquering colonial commodity,” noting that it “has been caught up in some of the central tensions of nationalist projects both in

³²⁰ James Owen, *Stone Age Milk Use Began 2,000 Years Earlier*, NAT’L GEOGRAPHIC (Aug. 6, 2008), https://web.archive.org/web/20080810105317/http://news.nationalgeographic.com/news/2008/08/080806-prehistoric-dairy_2.html [<https://perma.cc/BXY8-K96N>].

³²¹ Curry, *supra* note 249.

³²² See NIBERT, *supra* note 315, at 41; Mathilde Cohen, *Animal Colonialism: The Case of Milk*, 111 AM. J. SOC’Y INT’L L. UNBOUND 267, 267 (2017) [hereinafter Cohen, *Animal Colonialism*].

³²³ NIBERT, *supra* note 315, at 5–6, 252, 257.

³²⁴ *Id.* at 2, 5.

³²⁵ *Id.* at 5.

³²⁶ Cohen, *Animal Colonialism*, *supra* note 322, at 267.

the metropolises and their colonies.”³²⁷ Cohen notes that “[t]he fact that animal milk and dairy products are now ubiquitous around the globe, either because they are produced in regions with little or no history of dairying or because they are imported, is a testament to the sway of milk colonialism and international trade law.”³²⁸ In *The Gentle Cannibal: The Rise and Fall of Lawful Milk*, law scholar Yoriko Otomo similarly argues that “milk, with its symbolic and physiological powers of nurture and purification, plays a central role in securing the political economy of the late modern state and making lawful the bodies of its cities and its citizens.”³²⁹

Carol Adams has also written about how meat eating contributed to the Western world’s preeminence, describing how “[t]he racial[ized] politics of meat” worked to split “the world into intellectually superior meat eaters and inferior plant eaters,” accounting for the ways in which Western nations colonized other cultures.³³⁰ Dairy consumption, being the other side of the meat-eating coin in the animal agriculture industry,³³¹ played a similar role. Greta Gaard has noted that “in a colonial world, indigenous people are pressured to share the viewpoint of the colonizer, to believe themselves inferior, and to adopt the ways of the colonizer in order to ‘improve.’”³³² In the case of dairy, this has meant not only appropriation of indigenous lands for dairy production with the introduction of exotic livestock and European agricultural practices, but also that Eurocentric claims of the universal healthfulness of milk have gone largely unquestioned.³³³

Indeed, milk’s white color can’t be ignored in reflections on its role in perpetuating notions of white purity, power, and dominance. Milk’s whiteness, Otomo argued, led to it being “associated with purity (or perhaps, it is the association of purity with the colour white that derives from milk), which gave it a transcendental authority that perhaps made it attractive to a state seeking to validate its claim to power.”³³⁴ In *Of Milk and the Constitution*, Cohen explores the United States Supreme Court’s particular fascination about milk in its jurisprudence, that

³²⁷ *Id.* at 269 (citing Jonathan Saha, *Milk to Mandalay: Dairy Consumption, Animal History and the Political Geography of Colonial Burma*, 54 J. HIST. GEOG. 1, 2 (2016)).

³²⁸ *Id.* at 269.

³²⁹ Otomo, *supra* note 1, at 215.

³³⁰ ADAMS, *supra* note 268, at 52–54.

³³¹ Dairy cows are killed for meat when their milk production slows, and virtually all male calves and some female calves born to dairy cows are filled for meat. See *infra* Section III.C.

³³² Gaard, *supra* note 262, at 604.

³³³ *Id.* at 607–08.

³³⁴ Otomo, *supra* note 1, at 220.

through its jurisprudence, arguing that the Supreme Court has “protect[ed] as a quasi-constitutional right a liquid, which has become identified with the nation’s battle against various forms of otherness,” including race, ethnicity, class, and gender.³³⁵

Cohen argues that “[m]ilk’s whiteness and its newly acquired homogeneous aspect resonated with the modernist aesthetic of urban reform, which sought to ensure clean, airy dwellings, and a safe food supply for the growing white middle class.”³³⁶ Cohen also recognized milk as “a central vector of racial oppression,” examining ways in which,

[t]hrough its language of health, purity, and hygiene, the [Supreme] Court constructs milk as a biological tool for the control of the nation. Milk is not only needed as a literal food to feed the nation’s children and soldiers, but also, and perhaps most importantly, as a metaphorical substance which can purify and reform American society as a whole, from its military personnel to its growing class of urbanites to its immigrants.³³⁷

Sociologist Professor E. Melanie Dupuis has studied the historical links between milk-drinking and manifestations of white supremacy in society.³³⁸ Dupuis describes how milk served as a foundation in the construction of the modern Western state: the white drink, which at the time was perceived to be the “perfect food” from a nutritional point of view, was symbolically linked to the white body that was better able to digest milk than the bodies of people of color.³³⁹

For example, scientific experts in the early twentieth century considered dairy milk to be directly linked to the success and superiority of white northern Europeans as a race.³⁴⁰ The respected University of Wisconsin nutrition scientist E.V. McCollum wrote in his widely-read 1918 book *The Newer Nutrition* that:

[t]he peoples who have made liberal use of milk as a food, have, in contrast [to non-milk drinking peoples], attained greater size, greater longevity, and have been much more successful in the rearing of their young. They have been more aggressive than the non-milk using peoples, and have achieved much greater advancement in literature, science and art. They have developed in a higher degree educational

³³⁵ Cohen, *Of Milk and the Constitution*, *supra* note 14, at 149–68.

³³⁶ Cohen, *Of Milk and the Constitution*, *supra* note 14, at 147.

³³⁷ *Id.* at 148–49.

³³⁸ E. MELANIE DUPUIS, NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S DRINK (2002) [hereinafter DUPUIS, NATURE’S PERFECT FOOD].

³³⁹ *Id.* at 11, 117.

³⁴⁰ See, e.g., E.V. MCCOLLUM, THE NEWER KNOWLEDGE OF NUTRITION: THE USE OF FOOD FOR THE PRESERVATION OF VITALITY AND HEALTH 150–51 (Macmillan Co. 1918); Thomas Swann Harding, *Diet and Disease*, 26 SCI. MONTHLY, Feb. 1928, at 150–57.

and political systems which offer the greatest opportunity for the individual to develop his powers. Such development has a physiological basis, and there seems every reason to believe that it is fundamentally related to nutrition.³⁴¹

Similarly, in 1928, USDA publicist T. Swann Harding linked perceived “dietary deficiency to a deficiency in national character” among people from China and other Asian countries where dairy was not a central component in most people’s diets.³⁴² “Today,” Harding wrote, “the Chinese is peaceful, sequacious, unprogressive, unenterprising, nonperservering; his stature is poor, his physique bad, his mortality high.”³⁴³

Racist rhetoric about food wasn’t limited to scientists; a 1920s pamphlet from the U.S. National Dairy Council illustrates the extent to which notions of white superiority made it into official policy about milk, stating that “[t]he people . . . who are progressive in science and every activity of the human intellect are the people who have used liberal amounts of milk and its products.”³⁴⁴ The “people” that the pamphlet referred to were white people.³⁴⁵ The 1933 book *History of Agriculture of the State of New York* illustrates a similar idea:

A casual look at the races of people seems to show that those using much milk are the strongest physically and mentally, and the most enduring of the people of the world. Of all races, the Aryans seem to have been the heaviest drinkers of milk and the greatest users of butter and cheese, a fact that may in part account for the quick and high development of this division of human beings.³⁴⁶

Advertisements from the early-to-mid-twentieth century in Scandinavia, Germany, and the United States also perpetuated this trope, glorifying milk drinking as the ideal food for white bodies, often juxtaposing images of healthy-looking light-skinned people with sickly-looking darker-skinned ones.³⁴⁷ For instance, a pair of deeply offensive, explicitly racist images ran as magazine advertisements in the United States in 1916 depicting the deeply ingrained racist narrative at the time that milk represented

³⁴¹ E. Melanie DuPuis, *Angels and Vegetables: A Brief History of Food Advice in America*, 7 GASTRONOMICA: J. FOOD & CULTURE 34, 41 (2007), (quoting MCCOLLUM, *supra* note 340, at 150–51), <https://blogs.brown.edu/pols-1740-2011spring-s01/files/2011/02/gfc.2007.7.3.34.pdf> [<https://perma.cc/4MAP-QZFJ>] [hereinafter DuPuis, *Angels & Vegetables*].

³⁴² *Id.*

³⁴³ *Id.* (quoting Harding, *supra* note 340, at 153).

³⁴⁴ DUPUIS, NATURE’S PERFECT FOOD, *supra* note 338, at 117.

³⁴⁵ *Id.*

³⁴⁶ Freeman, *supra* note 250, at 1268 (citing ULYSSES PRENTISS HEDRICK, A HISTORY OF AGRICULTURE IN THE STATE OF NEW YORK 117–18 (1933)).

³⁴⁷ DUPUIS, NATURE’S PERFECT FOOD, *supra* note 338, at 117; *see also* HÅKAN JÖNSSON, MJÖLK—EN KULTURANALYS AV MEJERIDISKENS NYA EKONOMI, (SYMPOSION 2005).

whiteness and ink represented blackness.³⁴⁸ Each image shows a little black child. In one image, the child is seen crying above the caption, “I don’t want no white milk. I want my bottle of ink.”³⁴⁹ In the other image, the child is seen drinking out of a large ink bottle above a caption that reads “N-word Milk.”³⁵⁰

Whether through advertising, scientific opinion, or official government publications, explicitly racist rhetoric connecting notions of white superiority to milk permeated the first half of the twentieth century. “By declaring milk perfect,” writes DuPuis, “white northern Europeans announced their own perfection.”³⁵¹ As the next section discusses, links between milk and race are still present today.

2. Contemporary Links Between Milk and Race

The link between food policy, milk, and white dominance is not only a thing of the past; it extends to current official U.S. federal food policy and practices within today’s animal agriculture industry as well. In *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, law scholar Andrea Freeman discusses the phenomenon of “food oppression,” which she describes as the “institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group.”³⁵² The dairy industry, she argues, is one of the main culprits of perpetuating the food oppression that low-income people and people of color face, resulting in a culture that “constrain[s] their political voices, reduc[es] their work capacity, and drain[s] the energy of household and community members who must care for the sick and take on the responsibilities that ill members cannot fulfill.”³⁵³ Freeman’s research illustrates the

³⁴⁸ Library of Cong., Prints & Photographs Div., Visual Materials from the NAACP Records, *Reproduction No. LC-USZ62-35732*, <http://www.loc.gov/pictures/item/95517777/> [<https://perma.cc/QGU8-BZAE>] [hereinafter “Image One”]; Library of Cong., Prints & Photographs Div., Visual Materials from the NAACP Records, *Reproduction No. LC-USZC4-4296*, <http://www.loc.gov/pictures/item/95518135/> [<https://perma.cc/7JW9-GTZF>] [hereinafter “Image Two”].

³⁴⁹ Image One, *supra* note 348.

³⁵⁰ Image Two, *supra* note 348. The advertisement itself contains the full unredacted use of the N-word. For more context about this image, see DAVID PILGRIM, UNDERSTANDING JIM CROW: USING RACIST MEMORABILIA TO TEACH TOLERANCE AND PROMOTE SOCIAL JUSTICE (2015); David Pilgrim, *The Garbage Man: Why I Collect Racist Objects*, JIM CROW MUSEUM OF RACIST MEMORABILIA, <https://www.ferris.edu/HTMLS/news/jimcrow/collect.htm> [<https://perma.cc/WMV6-UHBG>].

³⁵¹ DUPUIS, NATURE’S PERFECT FOOD, *supra* note 338, at 11.

³⁵² Freeman, *supra* note 250, at 1253.

³⁵³ *Id.*

many subtle and not-so-subtle ways in which milk has been and continues to be used as a tool to oppress people of color.³⁵⁴

There has been some significant pushback on the dominance of whiteness in U.S. federal food policy, with organizations such as the Congressional Black Caucus criticizing the U.S. dietary guidelines for having a “consistent racial bias” because they recommend substantial dairy intake in the American diet—a recommendation that is difficult to follow for the majority of people who cannot digest lactase, a group that is disproportionately made up of people of color.³⁵⁵ In 1999, the Physicians Committee for Responsible Medicine (PCRM) filed a lawsuit against the USDA and the Department of Health and Human Services (DHHS), another federal agency involved in setting the dietary guidelines.³⁵⁶ “The suit allege[d] racial bias and conflict of interest in the formulation of the guidelines and the food pyramid. American minorities are disproportionately affected by chronic diseases, the suit charge[d], and would be better served by dietary guidelines more inclusive of their needs.”³⁵⁷ A number of prominent organizations and individuals doing advocacy work for people of color supported PCRM’s suit, including the Congressional Black Caucus and the National Association for the Advancement of Colored People (NAACP).³⁵⁸

“Although it may be unintentional,’ explain[ed] Dr. Milton Mills, [Associate Director of Preventive Medicine with PCRM], ‘the U.S. dietary guidelines as they exist are really a fundamental form of institutionalized racism in a rather destructive and insidious format.’”³⁵⁹

It isn’t only in U.S. federal food policy that the dairy industry runs up against issues of white dominance: there is evidence of it inside

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 1278; see also Salim Muwakkil, *Food Pyramid Scheme*, ALTERNET (July 4, 2000), http://www.alternet.org/story/9412/food_pyramid_scheme [<https://perma.cc/JFS3-VK6L>].

³⁵⁶ Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1 (D.D.C. 2000); see also Sally Squires, *USDA Loses a Battle in War on Diet Guides*, WASH. POST (Oct. 4, 2000), https://www.washingtonpost.com/archive/politics/2000/10/04/usda-loses-a-battle-in-war-on-diet-guides/319d08dc-6ed6-4dfe-83a2-388fc073aea1/?utm_term=.26c7061dd033 [<https://perma.cc/9L93-6JVK>].

³⁵⁷ Muwakkil, *supra* note 355.

³⁵⁸ *Id.* Others who supported the suit include the National Hispanic Medical Association, former Surgeon General Joycelyn Elders, former U.S. Representative Jesse Jackson Jr., and Martin Luther King III. *Id.*

³⁵⁹ *Id.*; see also Patricia Bertron, Neal D. Barnard, & Milton Mills, *Racial Bias in Federal Nutrition Policy, Part I: The Public Health Implications of Variations in Lactase Persistence*, 91 J. NAT’L. MED. ASS’N 151, 151 (1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2608451/> [<https://perma.cc/FH2Q-AMUC>]. In its ruling, the U.S. District Court for the District of Columbia held that the USDA had violated parts of the Freedom of Information Act and the Federal Advisory Committee Act in appointing and operating the national Dietary Guidelines Advisory Committee. See Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 3–5 (D.D.C. 2000); Squires, *supra* note 356.

the animal agriculture industry as well. After all, it is not just cattle who experience the trauma and exploitation inherent in being cogs in the wheel of the dairy industry. Milk production is made possible not only by the cows whose lives from birth to premature death are wholly devoted to the task, but also by the low-wage workers whose long hours of manual labor in factory farms and slaughterhouses are a key ingredient in the milk we drink.³⁶⁰ A majority of those workers are immigrants, virtually all of whom are from Mexico and Central America.³⁶¹ In 2014, immigrant labor accounted for 51% of all dairy labor, and dairies that employ immigrant labor produced 79% of the U.S. milk supply.³⁶²

Jobs in the animal agriculture industry are notoriously grueling for both body and mind, with many employers in the industry acknowledging that the unsavory working conditions repel U.S. citizens who may have other options.³⁶³ “We definitely wouldn’t be able to farm,” said one Wisconsin dairy employer about the idea of losing access to undocumented immigrants in her workforce.³⁶⁴ “I mean you just couldn’t do it without them. Because you can’t get anybody else that wants to work.”³⁶⁵ Another Wisconsin dairy employer had this to say:

This country cannot produce enough food to feed its own people without foreign labor It isn’t just dairy. It’s workers in slaughterhouses, it’s workers picking fruit. It’s all aspects of food is being supplemented by foreign labor. Because American citizens will not, *will not* do the work. It isn’t a matter of how much money. It’s a matter of they will not do it.³⁶⁶

Whether or not it is true that American citizens “will not do the work,” it is undeniable that work in the animal agriculture

³⁶⁰ Flynn Adcock, et al., *The Economic Impacts of Immigrant Labor on U.S. Dairy Farms*, TEXAS A&M AGRILIFE RES. (Aug. 2015), <http://cnas.tamu.edu/AAEA%2015%20Dairy%20Labor%20Survey%20Adcock%20Anderson%20Rosson.pdf> [<https://perma.cc/H3QM-KWG9>].

³⁶¹ *Id.*; see also Christina Goldbaum, *Trump Crackdown Unnerves Immigrants, and the Farmers Who Rely on Them*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/ny-farmers-undocumented-workers-trump-immigration.html> [<https://perma.cc/BU54-JZRY>] (“It has long been an open secret in upstate New York that the dairy industry has been able to survive only by relying on undocumented immigrants for its work force.”); Memorandum from Farmworker Justice on Selected Statistics on Farmworkers (noting that approximately 71% of farmworkers are immigrants, 95% of whom are from Mexico, 3% from Central America, and 2% from other countries), <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20fact%201-13-15FINAL.pdf> [<https://perma.cc/9AUJ-7GCT>].

³⁶² Adcock et al., *supra* note 360.

³⁶³ Alexandra Hall, *State Dairy Farms Losing Immigrant Workers*, URB. MILWAUKEE (Mar. 20, 2017, 6:41 PM), <http://urbanmilwaukee.com/2017/03/20/state-dairy-farms-losing-immigrant-workers/> [<https://perma.cc/63CA-NJH8>].

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

industry is physically and emotionally demanding. While it is impossible to quantify the full range of injuries associated with animal agriculture work because so many go unreported, data from the Occupational Safety and Health Administration (OSHA) showed that repetitive motion injuries among slaughterhouse workers “were nearly seven times that of other private industries,” with seventy-six percent of workers in one Maryland slaughterhouse suffering from “abnormal nerve conditions in at least one hand.”³⁶⁷ The toll this work takes on workers is not only physical;³⁶⁸ the emotional trauma that comes from animal agriculture work extends deep into the communities to which the workers belong.³⁶⁹ Research indicates that even when controlled for key demographic factors,³⁷⁰ the presence in a community of animal agriculture industry employment increases that community’s total arrest rates, arrests for violent crimes, and arrests for sex offenses compared to communities without animal agriculture jobs.³⁷¹ It is thus no wonder that “people fleeing desperate conditions in violence-ravaged countries have emerged as a key labor source for the nation’s vast and dangerous slaughterhouses.”³⁷² As *Mother Jones* asked in the subtitle of its January 2017 article on refugees in the animal agriculture workforce, “Where else are you going to find people desperate enough to work in a modern slaughterhouse?”³⁷³

³⁶⁷ Peggy Lowe, *Working ‘The Chain,’ Slaughterhouse Workers Face Lifelong Injuries*, NAT’L PUB. RADIO (Aug. 11, 2016, 8:00 AM ET), <http://www.npr.org/sections/thesalt/2016/08/11/489468205/working-the-chain-slaughterhouse-workers-face-lifelong-injuries> [https://perma.cc/W2A9-6J68]. Because all cows in the dairy industry eventually end up in slaughterhouses, it’s important to consider slaughterhouse workers as being part of the broader dairy industry workforce.

³⁶⁸ *Id.*; see also Yas Necati, *Never Mind CCTV in Slaughterhouses—We Need to End the Meat and Dairy Industry Altogether*, INDEPENDENT (Aug. 13, 2017, 1:30 PM), <http://www.independent.co.uk/voices/meat-dairy-vegan-slaughterhouses-vegetarian-a7891046.html> [https://perma.cc/2YSR-GP7B].

³⁶⁹ Amy J. Fitzgerald, Linda Kalof, & Thomas Dietz, *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover From “The Jungle” Into the Surrounding Community*, ORG. & ENV’T 1, 8, 10 (2009), http://www.animalstudies.msu.edu/Slaughterhouses_and_Increased_Crime_Rates.pdf [https://perma.cc/WK7R-WNBC].

³⁷⁰ The variables that were controlled for included “the number of young men in the county, population density, the total number of males, the number of people in poverty, international migration, internal migration, total non-White and/or Hispanic population, unemployment rate, and the total county population.” *Id.* at 15.

³⁷¹ The study noted that the increased incidents of violent crimes were “not found in the comparison industries, and they cannot be explained by unemployment, social disorganization, and demographic variables.” *Id.* It should be noted that it is not necessarily the case that it is the workers in the animal agriculture industry themselves who are associated with having committed such crimes.

³⁷² Tom Philpott, *Refugees Make Your Dinner. Literally*, MOTHER JONES (Jan. 31, 2017, 11:00 AM), <http://www.motherjones.com/environment/2017/01/meat-industry-refugees-trump/> [https://perma.cc/XBD2-6YWY].

³⁷³ *Id.*

A final contemporary example of milk being bound up in notions of white superiority is also the most extreme example: the use by members of the so-called “alt right” of milk as a symbol of white supremacy in the wake of the election of Donald J. Trump as president.³⁷⁴ It started a few weeks after Trump’s inauguration with what has since been dubbed “the milk party.”³⁷⁵

The milk party began as a large gathering of white men positioned in front of a camera stationed outside the Museum of the Moving Image in New York City.³⁷⁶ Part of an exhibit called *He Will Not Divide Us*, the camera—which began recording on the day of Donald Trump’s inauguration—was designed to capture and livestream passersby saying that exact phrase into the lens.³⁷⁷ On this particular night, however, the men gathered spewed a series of racist, sexist, homophobic, and other offensive rants.³⁷⁸ Many held large cartons of milk in their hands; one bare-chested man approached the camera with his carton and took a swig. “An ice-cold glass of pure racism,” he sneered into the lens.³⁷⁹

Milk went viral not long after that night, “joining the ranks of Pepe the Frog and the ‘okay’ emoji as symbols of [twenty-first]-century, post-Obama white supremacy.”³⁸⁰ It was seen touted at

³⁷⁴ This is a topic that has stirred strong emotions on both sides of the Atlantic. This author co-authored an op-ed on the subject that was published in August 2017 in *Aftonbladet*, one of Sweden’s largest newspapers, received such a significant viral response that a well-known political cartoonist published a cartoon about the controversy. See Pontus Lundkvist, (Aug. 15, 2017) (Swed.), <https://www.aftonbladet.se/kultur/a/JaVob/pontus-lundkvist> [<https://perma.cc/72VD-PLKZ>]; see also Tobias Linné & Iselin Gambert, *Så blev vit mjölk en symbol för vit makt*, AFTONBLADET (Aug. 5, 2017) (Swed.), <https://www.aftonbladet.se/debatt/a/2WzMB/sa-blev-vit-mjolk-en-symbol-for-vit-makt> [<https://perma.cc/H4TL-SF2V>]. When the author of this article posted a draft of it to SSRN in August 2018, Breitbart News wrote an article about it that generated significant commentary in the “comments” section to the article and on social media. See Tom Cicotta, *Law Professor Says Milk Is a Tool of ‘White Supremacy’*, BREITBART NEWS (Sept. 4, 2018), <https://www.breitbart.com/tech/2018/09/04/law-professor-says-milk-is-a-tool-of-white-supremacy/> [<https://perma.cc/WGM8-G43A>]. Three days after the Breitbart article about this article was published, the Wall Street Journal identified this article in its Notable and Quotable section. See *Notable & Quotable: Got Mylk?*, WALL ST. J. (Sept. 7, 2018, 5:34 PM ET), <https://www.wsj.com/articles/notable-quotable-got-mylk-1536356056> [<https://perma.cc/Z9J7-DFDC>]. For more background on this topic, see Andrea Freeman, *Milk, a Symbol of Neo-Nazi Hate*, CONVERSATION (Aug. 31, 2017, 7:25 PM EDT), <https://theconversation.com/milk-a-symbol-of-neo-nazi-hate-83292> [<https://perma.cc/LD42-DR5D>]; Gambert & Linné, *supra* note 9.

³⁷⁵ *Milk Party*, *supra* note 9.

³⁷⁶ *Installation: HeWillNotDivideUs.*, MUSEUM OF THE MOVING IMAGE, <http://www.movingimage.us/exhibitions/2017/01/20/detail/hewillnotdivide-us/> [<https://perma.cc/79HV-H4AG>].

³⁷⁷ *Id.*

³⁷⁸ Gambert & Linné, *supra* note 9; see also Wyatt Pahr, *He Will Not Divide Us (“Nazi” Party FRIDAY NIGHT)*, *hwndu hewillnotdivideus racist milk*, YOUTUBE (Feb. 5, 2017), https://www.youtube.com/watch?v=dTy6f_HyuQU [<https://perma.cc/KYT2-KW5R>].

³⁷⁹ Gambert & Linné, *supra* note 9; see also Pahr, *supra* note 378.

³⁸⁰ Gambert & Linné, *supra* note 9; see also Ashitha Nagesh, *Secret Nazi Code Kept Hidden by ‘Milk’ and ‘Vegan Agenda’*, METRO (Feb. 21 2017),

pro-Trump rallies and became the subject of a viral alt-right hashtag, #MilkTwitter, which was used in hundreds of tweets explicitly connecting milk with racist memes and sentiments.³⁸¹ Prominent alt-right figure Richard Spencer added a milk-bottle emoji to his Twitter profile.³⁸² While #MilkTwitter focused on the perceived connection between milk, whiteness, and idealized western masculinity, a related hashtag, #SoyBoy, went viral too, focusing its rhetoric on the perceived relationship between soy consumption, weakness, emasculation, non-whiteness, and all things politically correct.³⁸³ Both hashtags “celebrate traditional gender norms and the ‘good old days’ of white-dominated patriarchy, while ridiculing diversity and feminism.”³⁸⁴

Many dismissed #MilkTwitter and #SoyBoy as nothing more than the typical trolling ironic humor that characterizes the alt-right, “[b]ut irony and ambiguity are worth taking seriously: they are established strategies of alt-right trolls who seek to exploit Poe’s Law, the notion that it’s virtually impossible to distinguish between satire and sincerity online.”³⁸⁵ Irony allows for extremist views to hide in plain sight—in the words of prominent neo-Nazi Andrew Anglin, “non-ironic Nazism masquerading as ironic Nazism.”³⁸⁶ As law scholar Andrea Freeman summed it up in her August 2017 article *Milk, a Symbol of Neo-Nazi Hate*: “At this moment in history, both white supremacists and federal food policy in the United States are engaging in oppression through milk.”³⁸⁷

C. *Milk and Animal Exploitation*

As shown in previous sections, animal agriculture can be understood as an intersectional social system, where the production of meat and milk is shaped by relations of gender, race and capital. It is also a site where animals are (re)constructed and

<http://metro.co.uk/2017/02/21/secret-nazi-code-kept-hidden-by-milk-and-vegan-agenda-6463079/> [<https://perma.cc/6HHP-EQNG>].

³⁸¹ See Gambert & Linné, *supra* note 9.

³⁸² Gambert & Linné, *supra* note 9; *see also* Nagesh, *supra* note 380.

³⁸³ Gambert & Linné, *Rice Eaters to Soy Boys*, *supra* note 9, at 131. The author co-authored an article that provides a fuller analysis contextualizing the #SoyBoy hashtag and identifying how “[t]ropes of ‘effeminized’ masculinity have long been bound up with a plant-based diet, dating back to the ‘effeminate rice eater’ stereotype used to justify nineteenth century colonialism in Asia.” *See id.*

³⁸⁴ Gambert & Linné, *supra* note 9.

³⁸⁵ Gambert & Linné, *supra* note 9; Poe’s Law, KNOW YOUR MEME, <https://knowyourmeme.com/memes/poes-law> [<https://perma.cc/WSA6-L5QR>].

³⁸⁶ Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOC’Y RES. INST. 11 (May 15, 2017), <https://datasociety.net/output/media-manipulation-and-disinfo-online/> [<https://perma.cc/FP8C-QPKC>].

³⁸⁷ Freeman, *supra* note 374.

commodified to be used as objects for human consumption, in a way that will maximize economic profit.³⁸⁸ Given the realities of the dairy industry today, it is fitting that the very dictionary definition of the word “milk” means to “exploit.”³⁸⁹ Due to the increase in industrial agriculture during the twentieth century, the exploitation experienced by cows and other animals in the dairy industry is more pronounced today than ever before.

Today’s dairy industry—even on organic farms with “happy cows”—is, in the words of a 2014 *Modern Farmer* article, “a most unnatural operation”³⁹⁰ that is built on controlling and exploiting the most intimate aspects of the lives of cattle. Female cows are artificially inseminated each year to ensure their continued milk production, only to have their calves taken away from them shortly after birth.³⁹¹ Most male calves are deemed unprofitable and killed within days, while the rest are kept alive for a few months in extreme confinement before being killed for veal.³⁹² Female calves will be artificially inseminated when they are about eighteen months old, continuing the grisly cycle of unnatural birth and death in the name of milk.³⁹³

The production demands placed on dairy cows today are staggering, with one farmer telling the Nevada Dairy Council that he likens his cows’ performance to that of elite athletes.³⁹⁴ In fact, today’s cows have been bred to produce twice as much milk as they did just forty years ago,³⁹⁵ and six to seven times more than those a century ago.³⁹⁶ After three or four years, when their milk production falters, the cows are sent to slaughter,³⁹⁷ cutting short a lifespan that would have naturally been roughly twenty-years long.³⁹⁸

Much more could be said about the realities of the animal agriculture industry, but this much is clear: the lives of the billions of animals whose lives exist wholly within it are mired in suffering and a loss of agency and autonomy that present-day

³⁸⁸ See Erika Calvo, ‘Most farmers prefer Blondes’: *The Dynamics of Anthroparchy in Animals’ Becoming Meat*, 6 J. OF CRITICAL ANIMAL STUDIES 32 (2008).

³⁸⁹ *Milk*, OXFORD ENGLISH DICTIONARY (2018).

³⁹⁰ Mark Kurlansky, *Inside the Milk Machine: How Modern Dairy Works*, MODERN FARMER (Mar. 17, 2014), <http://modernfarmer.com/2014/03/real-talk-milk/> [<https://perma.cc/Q9ZX-7FVG>].

³⁹¹ *Id.*

³⁹² *The Life of: Dairy Cows*, COMPASSION IN WORLD FARMING, <https://www.ciwf.org.uk/media/5235185/the-life-of-dairy-cows.pdf> [<https://perma.cc/5AG2-89VU>].

³⁹³ *Id.*

³⁹⁴ *The Dent’s Athletes*, DAIRY COUNCIL OF UTAH & NEVADA, <http://www.dairy.councilutnv.com/2011/08/17/the-dents-athletes/> [<https://perma.cc/96Q4-2WBL>].

³⁹⁵ *About Dairy Cows*, COMPASSION IN WORLD FARMING, <https://www.ciwf.com/farm-animals/cows/dairy-cows/> [<https://perma.cc/8ABC-KPWF>].

³⁹⁶ Kurlansky, *supra* note 390.

³⁹⁷ *Id.*

³⁹⁸ *The Life of: Dairy Cows*, *supra* note 392.

humans would consider unconscionable if we were to subject other members of our own species to it.³⁹⁹

III. MYLK WITH A “Y”: THE DISRUPTIVE POSSIBILITIES OF PLANT MILK

As the sections above discuss, milk with an “i” is a word and a substance that has long been both literally and figuratively bound up in exploitation and oppression—of women, people of color, and nonhuman animals. Plant milk advocates on both sides of the Atlantic have recognized the power of the word “milk” and have been fighting battles over its use for decades. And because of its ability to uncouple “milk” from its association with female and animal fluids bound up in Western, white-dominated, patriarchal culture, plant milk has served as a disruptive milk for much of the last century, dismantling the dominant narratives around milk and offering a departure from the millennia-long tradition of using the substance as a tool of exploitation, power, and control.

The *Oatly* case illustrates the ways in which the milk wars are about far more than the legislative or courtroom battles over the word “milk,”⁴⁰⁰ though that is certainly an important part of the battle in the United States in particular. Specifically, the *Oatly* case and its aftermath—the skyrocketing sales of Oatly and other plant milks—shows that a significant cultural shift away from dairy milk has already occurred, and that cow’s milk is increasingly being recognized as something less than an ideal drink.⁴⁰¹ Rather than be seen as an imitation or substitute for dairy, plant milk is increasingly being embraced on its own terms.⁴⁰² An example of this is the following statement from Oatly’s website in 2016:

Please don’t compare us to cow’s milk. Seriously, we mean it. As long as we remain a substitute for people who don’t like the taste or concept behind cow’s milk we will never be accepted and validated for who and what we really are: an oat drink. That’s right, an oat drink. There we said it, made from real oats grown tall and strong in the soil of the

³⁹⁹ See MARJORIE SPIEGEL, *THE DREADED COMPARISON* (1998). Spiegel’s seminal book explores the similarities between the violence and subjugation humans have subjected other humans—in particular black people during slavery—to, and humans’ treatment of non-human animals. *Id.* She identifies powerful links between white oppression of black slaves and human oppression of nonhuman animals. *Id.* Spiegel does not argue that the oppressions suffered by black people and nonhuman animals have taken identical forms; she argues instead that they share the same relationship between the oppressor and the oppressed. *Id.*

⁴⁰⁰ See *supra* Section I.B.2.c.

⁴⁰¹ See *supra* Section I.B.2.c.

⁴⁰² For a discussion of the ways in which plant milk producers see themselves as creating products that are distinct from, and not substitutes for, dairy milk, see Linné & McCrow-Young, *supra* note 24.

earth, naturally containing fibers called betaglucans that are good for your heart. Perfect to drink from a glass, pour on your cereal, add to your coffee or cook something up with. Why would we ever need to refer to milk to explain this in the first place?⁴⁰³

Other examples of plant milk companies intentionally distancing themselves from dairy milk comparisons abound, from Califia and Ripple's use of whimsically-shaped plastic bottles instead of the traditional cardboard milk carton to products highlighting specific health, nutrition, and environmental impact statistics that *surpass*, rather than compete with, dairy milk.⁴⁰⁴

As this Part argues, perhaps the best way for plant milk to harness its disruptive powers is to offer a new linguistic path forward, through "mylk" with a "y"—not because it legally should be required to, but because in doing so plant milk could signal its rejection of all that milk with an "i" has come to represent, and its embrace of possibilities yet to be realized or even imagined.

A. *Mylk Over Milk: Verbal Activism and the Power of the "Y"*

Language is power; it shapes the way we understand the world around us and provides us with a way of structuring our experience of ourselves and the world.⁴⁰⁵ Capturing one of the most intriguing aspects of language's power, linguist Martin Edwardes explained that "language is not just a coding tool we use to give and get meaning; rather, it has an active role in producing these meanings. And so the conventions we build into our language affect what meanings are possible."⁴⁰⁶ As Peter Singer argues in his landmark work *Animal Liberation*, all languages reflect the prejudices of their users, and semantic classifications such as that of "animal" contribute to oppression by reproducing distance from us to them, preventing us from truly seeing animal suffering.⁴⁰⁷

⁴⁰³ *The Oatly Way*, OATLY (Mar. 4, 2016) <https://web.archive.org/web/20160304174904/http://www.oatly.com:80/the-oatly-way/> [<https://perma.cc/HFM2-73V2>].

⁴⁰⁴ Linné & McCrow-Young, *supra* note 24.

⁴⁰⁵ See, e.g., NORMAN FAIRCLOUGH, DISCOURSE AND SOCIAL CHANGE 2, 5–6 (Polity Press 1992).

⁴⁰⁶ Martin Edwardes, *What Might an Anarchist Language Look Like? I Created One, Inspired by Ursula le Guin*, CONVERSATION (Feb. 22, 2018, 4:37 AM EST), <https://theconversation.com/what-might-an-anarchist-language-look-like-i-created-one-inspired-by-ursula-le-guin-90775> [<https://perma.cc/ELJ6-VBLN>].

⁴⁰⁷ PETER SINGER, ANIMAL LIBERATION 14–15 (4th ed., Harper Perennial 2009).

Anyone who has read even a few passages by Shakespeare⁴⁰⁸ or Jane Austen and compare them to the way English is spoken today understands that language is also a living, breathing thing, something that changes over time and yields to the whims of those who use it and shape it into forms it has never taken before.⁴⁰⁹ Or, in some cases, back to forms previously left behind. Sometimes language changes slowly and organically over time; sometimes it changes quickly, the result of a deliberate, often political, choice.

Analyzing the connection between language, power, and the oppression of animals, Aran Stibbe shows how the battle for the hearts and minds of consumers taking place between the animal industries and animal activists is a battle that occurs primarily through language and the media.⁴¹⁰ Further, that language is an important tool for political and social activism is a notion discussed by philosophy professor Lisa Kemmerer in *Verbal Activism: "Anymal,"* in which she notes that "[l]inguistic conventions emerge from struggles for power and power relations; language legitimizes and is made legitimate by the status quo, contributes to domination, and is an important medium for social control."⁴¹¹ Noting that there is "no word in the English language for any animal who is not a human being," Kemmerer proposes the creation of a new word, *anymal*, to replace the "cumbersome" existing alternatives including "nonhuman animal," 'other animals,' and 'animals other than humans.'⁴¹²

⁴⁰⁸ For example, this famous passage from Act II of Shakespeare's *Hamlet* is understandable by today's readers but few if any contemporary writers would craft the passage in this way:

"Doubt thou the stars are fire,
Doubt that the sun doth move,
Doubt truth to be a liar,
But never doubt I love."

WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

⁴⁰⁹ Ludwig Wittgenstein's landmark work *Philosophical Investigations* discusses the notion that language changes over time. "For Wittgenstein, language (1) holds a moral element, (2) is important in forming our understanding of the world around us, and (3) is created and recreated." See Lisa A. Kemmerer, *Verbal Activism: "Anymal,"* 14 SOC'Y & ANIMALS 9, 10 (2006) (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. E. M. Anscombe trans., 1953)), <http://lisakemmerer.com/Articles/anymal%20article%20Jan%202016.pdf> [<https://perma.cc/98XV-85XF>].

⁴¹⁰ See generally Aran Stibbe, *Language, Power and the Social Construction of Animals*, 9 SOC'Y & ANIMALS 145 (2001).

⁴¹¹ Kemmerer, *supra* note 409 (citing Norman Fairclough, *Language and Power* 1–3 (1989)).

⁴¹² *Id.* at 10.

In advocating for the adoption of the word “anymal,” Kemmerer points out the structural problems inherent in terms such as “nonhuman animals” and “other animals”—namely that they “emphasize Western dualism through the use of ‘non’ and ‘other.’”⁴¹³ Noting that “Western dualism generally has assumed that one category is the norm—superior, dominant, male, white, or, in this case, the human being—and is juxtaposed over and against its supposed opposite—black, woman, other animals, nonhuman animals, and animals other than human beings,” Kemmerer views “anymal” as an opportunity to use “verbal activism” to reject the problematic power dynamics inherent in this dualism.⁴¹⁴

“Verbal activism,” as Kemmerer defines it, is “using language with intent to bring social change.”⁴¹⁵ Verbal activism, she argues, can be powerful even if it doesn’t result in widespread change; for instance, “[w]hen we encounter a new word, or an alternative word, our interest is sparked; we are likely to pause and inquire. Ultimately, we must decide whether we will accept or reject the suggested change.”⁴¹⁶ Kemmerer argues that when it comes to measuring the success of an act of verbal activism, it is largely the degree of “the dialogue it generates” that determines a new word’s degree of success.⁴¹⁷ While “anymal” is not, at the time of this writing, a widely-adopted word by any measure, it is a word that the author has seen used in presentations at animal studies conferences and which has sparked debate and discussion among animal studies scholars. That said, it remains to be seen whether “anymal” may, over time, grow in influence and spark wider discussions and debates even outside scholarly circles in the years ahead.

A more well-known example of verbal activism is the word “womyn,”⁴¹⁸ which was first discussed in the Introduction to this article.⁴¹⁹ Because many feminists view language as an instrument of patriarchy, the feminist movement has taken particular interest in the ways in which language is used to give, get, and produce meaning.⁴²⁰ In some instances, national governments have played an official role in “feminist language

⁴¹³ *Id.* at 11.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 12.

⁴¹⁶ *Id.* at 13.

⁴¹⁷ *Id.* at 13–14.

⁴¹⁸ *Why the Y?*, WOMYN’S CENTRE, <https://womynscentre.wordpress.com/why-the-y/> [https://perma.cc/B224-53Y2].

⁴¹⁹ See *supra* note 3 and accompanying text.

⁴²⁰ Anne Pauwels, *Feminist Language Planning: Has it Been Worthwhile?*, LINGUISTIK ONLINE, Bd. 2, Nr. 1 (1999), <https://bop.unibe.ch/linguistik-online/article/view/1043/1707> [https://perma.cc/JU78-8R2T].

planning,”⁴²¹ often with the goal of “[c]reating a women-centered language capable of expressing reality from a female perspective.”⁴²² In the mid-1970s, for example, a small group of American feminists took matters into their own hands and sought to disrupt the patriarchy in the process.⁴²³ The founders of the Michigan Womyn’s Music Festival revived an Old English word for “women,” replacing the “e” with a “y” as an explicit rejection of the way the word “women” has historically been bound up with the word “men.”⁴²⁴

While not in widespread use today, “womyn” is a well-known word in feminist circles and is used as an expression of female autonomy and a rejection of patriarchal linguistic norms.⁴²⁵ Echoing Kemmerer’s criteria for measuring the success of an act of verbal activism, the University of Manitoba Womyn’s Centre explains its use of the word “womyn” this way: “In changing just one letter in the word ‘women’ your curiosity peaks and challenges you to think outside the box. This is exactly what we are trying to do! We want to draw people’s attention to what the word ‘woman’ historically means and its implication.”⁴²⁶ Another sign that “womyn” has been a successful act of verbal activism is the increasing trend among university groups to use term “womxn” rather than “women” in official communications, and the use of the gender-neutral “Mx” as an official and increasingly popular honorific in the United Kingdom.⁴²⁷ Without “womyn” paving the way in the 1970s, it seems unlikely that the mainstream media would, in late 2018, be covering stories of universities, drivers licenses, and bank statements⁴²⁸ making use of these newly-created words that, in and of themselves, are acts of verbal activism.

Plant milk advocates today face a similar opportunity to harness the power of the “Y” that advocates of “anymal” and “womyn” have done. After all, it might be said that plant milk and

⁴²¹ Karin Milles, *Feminist Language Planning in Sweden*, 12 CURRENT ISSUES IN LANGUAGE PLAN. 21 (2011), <https://www.tandfonline.com/doi/abs/10.1080/14664208.2011.541388> [<https://perma.cc/LB8B-6KBJ>].

⁴²² Pauwels, *supra* note 420.

⁴²³ See MALLINSON, *supra* note 2, at 430–31.

⁴²⁴ See *id.* 430–31.

⁴²⁵ *Why the Y?*, *supra* note 418.

⁴²⁶ *Id.*

⁴²⁷ Jack Guy, *Women or ‘Womxn’? Students Adopt Inclusive Language*, CNN (Nov. 27, 2018, 11:38 AM ET), (explaining that the student union at Goldsmiths, University of London, and a student society at King’s College London have introduced the “womxn” spelling in an effort to promote inclusivity and “avoid excluding particular groups of people,” including trans women), <https://www.cnn.com/2018/11/27/uk/womxn-inclusive-language-gbr-scli-intl/index.html> [<https://perma.cc/3MPP-D8KH>].

⁴²⁸ *Id.*

dairy milk make strange bedfellows. Given the fact that the word “milk” with an “i” is seen as predominantly female and animal in nature and at the same time is bound up in thousands of years’ worth of exploitation and oppression of animals, women, and people of color, plant milk advocates may find it empowering to reject the word in favor of something new—or old, as the case may be.

“Mylk,” like “womyn,” is an Old English word that contains within it the opportunity to envision—and create—a different world. Unlike stale, unimaginative, and ambiguous words like “drink” and “beverage,” “mylk” simultaneously embraces the long history of plant milk being identified as milk (and not mere “drinks” or “beverages”) while explicitly rejecting the exploitation and oppression that is bound up in “milk” with an “i.” It avoids the problematic dualism inherent in terms like “nondairy beverage” or even “nondairy milk” that, like “nonhuman animal,” sets up one category—human animals, dairy milk—as the superior norm when juxtaposed against its supposed opposite. In short, it is a word worth taking seriously.⁴²⁹

Like with “anymal” and “womyn,” by changing just one letter in a word that is one of the most common in our culture, plant milk advocates can pique people’s curiosity and challenge people to think outside the box: the “y” invites people to think about what the word milk with an “i” means both historically and currently as a tool of exploitation and oppression, and the implications of perpetuating that word. What they will find is that unlike “milk,” “mylk” is unencumbered by the history of animal abuse, exploitation and commodification that “milk” cannot escape. “Mylk” is not saddled by the weight of a millennia of laws and regulations that have controlled female bodies and lives, human and nonhuman alike. “Mylk” is free of the connotations that link it to notions of white superiority that have caused everything from racist federal food policy to white supremacist rhetoric in the name of “milk” with an “i.”⁴³⁰

⁴²⁹ That’s not to say that “nonsense words” can’t be effective verbal activism, too. Even just the *idea* of a linguistic play-on-words by plant milk sellers seems to have provoked the Swedish dairy industry: a pair of August 2018 advertisements from Sweden’s largest dairy company, Arla, explicitly targeted “nonsense words” not actually used to promote any Swedish plant milk product (in this case, nonsense words “brölk” and “pjölk” compared to the Swedish word for milk, “mjölk”) being used for plant milks, arguing that “bara mjölk smakar mjölk” (“only milk tastes like milk”). See Arla Sverige, *Pjölk till Skollunchen*, YOUTUBE (Aug. 28, 2018), <https://www.youtube.com/watch?v=j3GWtqjyMDQ> [<https://perma.cc/V7Z7-KENK>]; Arla Sverige, *Brölk i kaffet*, YOUTUBE (Aug. 28, 2018), <https://www.youtube.com/watch?v=I26cj4gOBPU> [<https://perma.cc/4QVK-UCCM>].

⁴³⁰ See *supra* Section II.B.2.

The word “mylk” already has a long history within the vegan community of signifying plant milk.⁴³¹ The practice is gaining wider and more commercial appeal, with a range of companies selling plant-milk products, like U.K.-based Rebel Kitchen, L.A.-based Made With Love Wellness Co., and Australian-based Loving Earth, currently using the term to describe the plant-based milk in their vegan beverages and chocolate bars.⁴³²

Plant milk companies should not adopt “mylk” to avoid misleading consumers; as Emily Byrd from the Good Food Institute (GFI) wrote, “[c]onsumers are not buying plant-based milk because they have been tricked into believing they actually came from a cow.”⁴³³ Rather, companies should adopt “mylk” because like the word “womyn,” “mylk” offers a departure from a problematic history and association with exploitation and oppression. It signals to the consumer a different narrative about milk, bringing up the injustices, exploitation and suffering bound up in the history of the word “milk” and offering a different path forward.

Perhaps the best way for animal and environmental advocates to stand up to the dairy lobby and the FDA is to let cows keep their “milk,” and instead embrace the power of the “y.” Fighting for the widespread adoption of “mylk” may be the most powerful way to embrace the notion of a “post-milk generation” that Oatly has talked about in its marketing,⁴³⁴ and to show a demand for a more just and less exploitative world.

B. Possible Drawbacks and Limitations to Mylk with a “Y”

While the possibilities contained within a more widespread adoption of the word “mylk” to signify plant milk are many, such a development is not without potential drawbacks and significant limitations. First, there is the real danger that advocating for the adoption of “mylk” with a “y” will be used by

⁴³¹ The author has seen the word “mylk” used to refer to plant milk in restaurant menus, vegan food blogs, and elsewhere for over a decade. *See, e.g., *New! Mylk Chocolate Truffles & Mother’s Day Collection 2012*, GNOSIS CHOCOLATE (Apr. 29, 2012), <http://gnosischocolate.squarespace.com/chocoblog/2012/4/29/new-mylk-chocolate-truffles-mothers-day-collection-2012.html> [<https://perma.cc/K4EN-A6RA>].

⁴³² LOVING EARTH, <https://lovingearth.co/> [<https://perma.cc/JW55-B3VY>]; MADE WITH LOVE WELLNESS CO., <https://mwlwellness.com/> [<https://perma.cc/LLC2-AQG5>]; REBEL KITCHEN MYLK, <https://www.rebel-kitchen.com/> [<https://perma.cc/D2EL-PPCV>].

⁴³³ Emily Byrd, *Is Soy Milk Really Milk?*, L.A. TIMES (Jan. 4, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-byrd-soymilk-fda-definition-20170104-story.html> [<https://perma.cc/592L-4Y9D>].

⁴³⁴ Oatly sold “post milk generation” t-shirts as recently as late 2017. OATLY, <https://web.archive.org/web/20171201040347/http://www.oatly.com/> [<https://perma.cc/4BAQ-KBXA>].

the dairy lobby to further marginalize and otherize plant milk, just as it is gaining traction and popularity. There are unmistakable benefits for plant milk advocates to continue fighting for use of the word “milk” with an “i” because it arguably legitimizes plant milk in the eyes of a mainstream consumer who is less interested in rejecting exploitation and oppression and more interested in looking for a healthy or more environmentally sustainable alternative for animal milk.

Second, as posthumanist philosopher Donna Haraway argues, “[t]here is no way to eat and not to kill,”⁴³⁵ and this notion—while it has been critiqued for providing “an apology for systemic animal abuse”⁴³⁶—can help shine light on the fact that as long as plant milk is produced within a capitalist structure, it can never be completely severed from the exploitation and oppression that follows from the consumption and production of food items. From low wages and poor or even dangerous working conditions of the farmers and factory workers who grow and produce the ingredients in a carton of plant milk to the GMOs, chemicals, and pesticides often used in growing the soy, almonds, oats, sugar, and other crops involved in plant milk production, it’s impossible for plant milk to be a totally pure substance devoid of exploitation.⁴³⁷ Critical race feminist scholar A. Breeze Harper critiques the tendency of vegan products sold in the United States to place more importance on the “cruelty free” aspect of their products in relation to nonhuman animals than ensuring that those same products are also “human cruelty free.”⁴³⁸ Unless vegan and other “animal cruelty free” products—from food to cotton and other materials—contain labels indicating that they were sourced and produced in a “fair trade” a sweatshop free manner, Harper argues, “there is no guarantee that the [product] is free of human suffering and/or slavery.”⁴³⁹

Ethical contradictions are particularly difficult to avoid in the production and consumption of food within a capitalist structure. Plant milk company WhiteWave, for example, was

⁴³⁵ DONNA J. HARAWAY, *WHEN SPECIES MEET* 295 (Univ. Minn. Press 2008).

⁴³⁶ Zipporah Weisberg, *The Broken Promises of Monsters: Haraway, Animals and the Humanist Legacy*, 7 J. CRITICAL ANIMAL STUD. 22, 39 (2009).

⁴³⁷ See, e.g., Amie Breeze Harper, *Race as a Feeble Matter in Veganism: Interrogating Whiteness, Geopolitical Privilege, and Consumption of Philosophy of “Cruelty-Free” Products*, 8 J. CRITICAL ANIMAL STUD. 5, 13 (2010) (explaining that “[v]egan chocolate, sugar, and cotton . . . are examples of how globalized racism sustains geopolitically racialized hierarchies of food and animal-free textile production”).

⁴³⁸ *Id.* at 17 (“It cannot be overlooked that the ‘ethics’ of geopolitically racialized production of non-fair trade cocoa and sugar for [vegan food company] Turtle Mountain (and its consumers), is not as equally important as ensuring that the sugar is ‘bone free’ and sea turtles are given the right to self-determination and survival.”).

⁴³⁹ *Id.* at 19.

purchased for \$12.5 billion by the multinational dairy corporation Danone,⁴⁴⁰ a move that might at first glance appear contradictory. But from a business perspective it makes good sense for the dairy industry to invest in the very sector trying to disrupt the dairy market: it is a great way for the dairy industry to “cover its bases” and come out profitable no matter how the milk wars end up turning out. As Nicole Shukin argued, “the paradox of an anthropocentric order of capitalism” is that its “means and effects can be all too posthuman, that is, one that ideologically grants and materially invests in a world in which species boundaries can be radically crossed . . . in the . . . pursuit of new markets.”⁴⁴¹

Third and finally, there is the reality that many plant milks are sold at prices higher than the price of dairy milk, making it significantly less accessible to people in poor and working class communities—assuming the grocery stores in those communities even stock plant milk on their shelves.⁴⁴² Further, the low wage workers who grow the crops and produce plant milk are still predominantly people of color.⁴⁴³ While the work involved in growing and processing plants into plant milk is likely less traumatic than working in the animal agriculture industry, structural problems inherent in capitalism prevents farmworker jobs from being tied to good working conditions and a living wage.

CONCLUSION

While the limitations identified in the section above are real, they do not mean that plant milk advocates should not embrace “mylk” with a “y.” Advocates can and should celebrate the ways in which plant milk already breaks down barriers and creates openings for new ways of interacting with the world. One example is the way that plant milk breaks down the monolithic nature of dairy milk: while virtually all animal milk—and dairy products more broadly—comes from cows, plant milk is as diverse as the crops that grow in any given part of the world. Because of the diversity of plant milks available, there is something for

⁴⁴⁰ See Daneshkhu, *supra* note 205.

⁴⁴¹ NICOLE SHUKIN, ANIMAL CAPITAL: RENDERING LIFE IN BIOPOLITICAL TIMES 11 (2009).

⁴⁴² See ALEXIS SHOTWELL, AGAINST PURITY: LIVING ETHICALLY IN COMPROMISED TIMES 125 (2016) (noting that in associating a guarantee of ‘purity’ with certain forms of consumption and not others, ethics becomes attainable only to those who are most privileged by and within the system); see also Lauren Ornelas, *Shining a Light on the Valley of Heart’s Delight: Taking a Look at Access to Healthy Foods in Santa Clara County’s Communities of Color and Low-Income Communities*, FOOD EMPOWERMENT PROJECT 8 (2010), http://www.foodispower.org/documents/FEP_Report_web_final.pdf [<https://perma.cc/L3NY-ACZA>].

⁴⁴³ See, e.g., Harper, *supra* note 437, at 13–24 (discussing ways in which vegan products such as chocolate are often produced under poor and exploitative working conditions).

everyone, regardless of allergies or taste preferences, and there are opportunities for countries and regions to equitably produce their own plant milks that reflect the local culture.

At bottom, there is a real need for plant milk advocates to join forces with people doing work identifying intersectional approaches to resisting and disabling dominant power structures that perpetuate inequalities in society. A. Breeze Harper reminds us that while “mainstream vegan media” may not recognize it, “*space*, vegan or not, is *raced* and simultaneously *sexualized* and *gendered* directly affecting individuals and place identities.”⁴⁴⁴ Herein lies the potential of a vegan movement that centralizes the dynamics of race, culture, and gender⁴⁴⁵ to disrupt normative white-masculine dairy culture.

At the end of the day, the “milk wars” on both sides of the Atlantic serve as a barometer of plant milk’s role as a disruptive force in the millennia-long relationship between humans and milk. Plant milk should be allowed to call itself “milk,” as people have done for centuries across the globe. But by replacing the “i” with a “y,” plant milk—or mylk—advocates can signal to the world that they are not only aware of plant milk’s disruptive force both legally and culturally, but are explicitly celebrating the possibilities plant mylk has in leaving behind a tradition of exploitation and oppression in place of a kinder, more ethical way of interacting with the world.

⁴⁴⁴ *Id.* at 6 (citations omitted) (emphasis in original).

⁴⁴⁵ See *id.*; Maneesha Deckha, *Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals*, 27 HYPATIA 527, 527–28 (2012).